UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLORADO SYMPHONY ASSOCIATION, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	Case No. 18-1189 **PETITION FOR REVIEW**

Petitioner Colorado Symphony Association ("Petitioner" or "CSA"), pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, et seq. ("the Act"), and Fed. R. App. P. 15, hereby petitions the Court for review of the Order of the National Labor Relations Board ("Board") entered on July 3, 2018. As grounds therefore, Petitioner states as follows:

1. On July 3, 2018, the Board stated its findings of fact and conclusions of law and issued an Order in Case Nos. 27-CA-140724, 27-CA-155238, 27-CA-161339, 27-CA-179032 and 27-CA-168029.

2. CSA petitions this Court to review, modify, and set aside the Board's final order in Case Nos. 27-CA-140724, 27-CA-155238, 27-CA-161339, 27-CA-179032 and 27-CA-168029. 29 U.S.C. § 160(f).

3. This Court has jurisdiction over this Petition pursuant to Section 10(f) of the NLRA. 29 U.S.C. § 160(f).

WHEREFORE, pursuant to Section 10(f) of the National Labor Relations Act, as amended, and Fed. R. App. P. 15, Petitioner respectfully requests that this Honorable Court cause notice of the filing of this Petition for Review to be served on the Board, and that this Court take jurisdiction of the proceeding and enter a judgment modifying or setting aside the Board's July 3, 2018 Order.

Respectfully submitted this16th day of July, 2018.

SHERMAN & HOWARD L.L.C.

s/ Patrick R. Scully

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 16th day of July, 2018, I electronically filed the foregoing **PETITION FOR REVIEW** with the Clerk of the Court using the CM/ECF system.

I further certify that on this16th day of July, 2018, a true and correct copy of the foregoing **PETITION FOR REVIEW** was served on the following individuals addressed to them at the following addresses:

Gary Shinners (E-File)
Executive Secretary
National Labor Relations Board
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Washington, DC 20570

Paula S. Sawyer (E-File)
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s/ Lynn Zola Howell

Colorado Symphony Association *and* American Federation of Musicians of the United States and Canada, AFL–CIO/CLC. Cases 27–CA–140724, 27–CA–155238, 27–CA–161339, and 27–CA–179032

July 3, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On February 14, 2017, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed reply briefs. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions;[3] to amend the remedy;[4] and to adopt the

[1] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a postbrief letter calling the Board's attention to recent case authority.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In finding that the Respondent unlawfully refused to provide the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (the AFM) with requested information, we agree with the judge that it was unreasonable for the Respondent to insist that the AFM sign a confidentiality agreement that included a monetary damages clause. As the judge discussed, the AFM offered to sign a confidentiality agreement that would limit who could view the information and that stipulated the AFM would use the information only for bargaining purposes. Nonetheless, the Respondent persistently demanded that the AFM sign a confidentiality agreement that included a monetary damages clause. Absent any basis for believing the AFM would violate the confidentiality agreement, we agree with the judge that the Respondent's insistence on a monetary damages clause undermined any confidentiality defense. See generally *Albertson's, Inc*., 351 NLRB 254, 287 (2007) ("[A]n employer may not with impunity needlessly make it difficult for the Union to obtain relevant information necessary to its representative role."). Cf. *Pertec Computer*, 284 NLRB 810, 811–812 (1987), supplemented by 298 NLRB 609 (1990), enfd. in relevant part sub nom. *Olivetti Office USA, Inc. v. NLRB*, 926 F.2d 181 (2d. Cir. 1991), cert. denied sub nom. *Auto Workers Local 376 v. Olivetti Office USA*, Inc., 502 US 856 (1991).

We disagree with our colleague that our assessment of the Respondent's proposal in this context is improper. The Board generally does not evaluate whether particular proposals are acceptable or unacceptable. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952). But where an employer has demonstrated a confidentiality interest, it must seek a reasonable accommodation of its concerns and the Union's need for the requested information. *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). The burden of formulating a reasonable accommodation is on the employer. Id. Here, we find that the Respondent's proposal—which was premised on the non-negotiable inclusion of a monetary damages clause—was not a reasonable accommodation in the circumstances and thus the Respondent failed to adequately fulfill its duty to accommodate.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally changed terms and conditions of employment by not compensating its musicians' under the terms of the AFM's Video Game Agreement for the "Oh Heck Yeah" project, we disagree with our colleague's assertion that the General Counsel failed to prove that this project involved video-game work. As a preliminary matter, the Respondent admitted that the "Oh Heck Yeah" project was "a large-scale video game" in a position statement. Further, the judge credited testimony from three witnesses—the AFM's Director of Symphonic Electronic Media, the former President of the Denver Musicians Association Local 20-623, and an orchestra musician—establishing that the "Oh Heck Yeah" project was a public art project in the form of an interactive video-game display. Accordingly, we agree with the judge that the Respondent's musicians were commissioned to play original music for a large-scale video-game display that fell within the scope of the AFM's Video Game Agreement.

In addition, we agree with the judge's finding that the Respondent's June 2016 statements—which communicated its view that the AFM was not the certified bargaining representative of the musicians—constituted an unlawful withdrawal of recognition from the AFM. See *New Brunswick General Sheet Metal Works*, 326 NLRB 915, 922 (1998) (finding withdrawal of recognition where employer stated that there was "no longer a collective-bargaining relationship in existence" with the union).

Finally, in affirming the judge's conclusions, we do not rely on his citations to *Hospital Santa Rosa, Inc. a/k/a Clinica Santa Rosa*, 365 NLRB No. 5 (2017), or *PCA Industries, Inc.*, 1995 WL 1918057 (1995). In the absence of relevant exceptions, these decisions have no precedential value. See *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999).

Member Kaplan would not find that the Respondent unlawfully insisted on a monetary damages provision to protect its legitimate confidentiality concerns before providing the AFM with requested information. He believes his colleagues and the judge are mistaken in stating that the Respondent could not bargain for such protection in the absence of a belief that the AFM would breach its proffered confidentiality agreement. It is enough that the Respondent had a legitimate concern that the information *might* be leaked, whether or not intended by the Union, and that some monetary damages be specified in advance to incentivize the Union to guard against that happening and to guarantee some compensation for the Respondent's loss if it did happen. The majority's contrary finding constitutes an impermissible assessment of the reasonableness of the Respondent's bargaining proposal, an analysis that the Supreme Court has clearly instructed is not within the Board's authority. See *American National Insurance*, supra. Accordingly, Member Kaplan would dismiss the allegation that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the information requested by AFM and he would not rely on this conduct when joining his colleagues in affirming the finding that there was no bargaining

recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Colorado Symphony Association, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (AFM) by failing and refusing to furnish it with requested information that is relevant and necessary to the AFM's performance of its functions as the collective-bargaining representative of the Respondent's unit employees regarding wages, hours, and other terms and conditions of employment for the production of national electronic and recorded media.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing its initial contract proposal for a successor to the Symphony, Opera or Ballet Orchestra Integrated Media Agreement (IMA) without the parties having reached a lawful impasse.

(c) Unilaterally changing the terms and conditions of employment of its unit employees for work on national media projects without first notifying the AFM and giving it an opportunity to bargain.

(d) Bypassing the AFM and dealing directly with the Respondent's musicians with regard to wages, hours, and other terms and conditions of employment for the production of national electronic and recorded media.

(e) Unilaterally changing national media terms and conditions of employment of its unit employees in the Respondent's collective-bargaining agreement with the Denver Musicians Association, Local 20-623, without first notifying the AFM and giving it an opportunity to bargain.

(f) Withdrawing recognition from the AFM and failing and refusing to bargain with the AFM as the exclusive collective-bargaining representative of unit employees regarding wages, hours, and other terms and conditions of employment for the production of national electronic and recorded media.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the AFM in a timely manner the information requested by the AFM on July 18, 2014 (requests 1-2, 3(b)-(c), 5-6); June 3, 4, and 17, 2015; and June 16, 2016.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the AFM as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All Contract musicians, Replacement musicians, Substitute musicians, and Extra musicians employed by the Colorado Symphony Association, as described in the Agreement between the Respondent and Local 20-623.

(c) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on October 20, 2014, when it implemented its June 23, 2014 contract proposal.

(d) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on September 7, 2015, in the Respondent's collective-bargaining agreement with the Denver Musicians Association, Local 20-623.

(e) Make whole unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's decisions to: implement its June 23, 2014 contract proposal; have musicians work on the "Oh Heck Yeah," "Dona Nobis Pacem/Missa Mirabilis," "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra," and "Gregory Alan Isakov with the Colorado Symphony" media projects without following the applicable AFM media agreement; and change national media terms and conditions of employment in the Respondent's

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impasse when the Respondent unlawfully implemented its initial contract proposal of October 20, 2014, without first bargaining with the AFM to impasse.

Member Kaplan also disagrees with his colleagues and the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by making unilateral changes to musicians terms and conditions of employment when it recorded a soundtrack titled "Oh Heck Yeah" for an interactive large scale public arts project. He would find that the General Counsel failed to prove that this project involved video game work that fell within the scope of the AFM's Video Game Agreement.

[4] We shall amend the recommended remedy to require the Respondent to rescind changes to national media terms that were unlawfully implemented in the Respondent's collective-bargaining agreement with the Denver Musicians Association, Local 20-623, without the involvement of the AFM. See *California Nevada Golden Tours*, 283 NLRB 58, 68–70 (1987).

[5] We shall modify the judge's recommended Order to conform to our amended remedy and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

Although the Respondent excepts generally to the judge's finding that it unlawfully withdrew recognition from the AFM in violation of Sec. 8(a)(5) and (1), it does not except to the judge's remedy of an affirmative bargaining order. We therefore find it unnecessary to pass on whether a specific justification for that remedy is warranted. *SKC Electric, Inc*., 350 NLRB 857, 862 fn. 15 (2007). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

collective-bargaining agreement with the Denver Musicians Association, Local 20-623.

(f) Reimburse unit employees for any expenses resulting from any failure to make contributions to benefit funds required under the IMA or applicable AFM agreement.

(g) Make all required benefit fund payments or contributions to benefit funds required under the IMA or applicable AFM agreement that the Respondent has failed to make in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(h) Recognize, and on request, bargain with the AFM as the exclusive collective-bargaining representative of the employees in the specified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(i) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Denver, Colorado facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 5, 2014.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 3, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (the AFM) by failing and refusing to furnish it with requested information that is relevant and necessary to the AFM's performance of its

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

functions as your collective-bargaining representative regarding wages, hours, and other terms and conditions of employment for the production of national electronic and recorded media.

WE WILL NOT change your terms and conditions of employment by implementing our contract proposal for a successor to the Symphony, Opera or Ballet Orchestra Integrated Media Agreement (IMA) without reaching a lawful impasse.

WE WILL NOT change your terms and conditions of employment for work on national media projects without first notifying the AFM and giving it an opportunity to bargain.

WE WILL NOT bypass the AFM and deal directly with musicians with regard to wages, hours, or other terms and conditions of employment for the production of national electronic and recorded media.

WE WILL NOT change your terms and conditions of employment for national media projects in our collective-bargaining agreement with the Denver Musicians Association, Local 20-623, without first notifying the AFM and giving it an opportunity to bargain.

WE WILL NOT withdraw recognition from the AFM or fail and refuse to bargain with the AFM as your exclusive collective-bargaining representative regarding wages, hours, and other terms and conditions of employment for the production of national electronic and recorded media.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL furnish to the AFM in a timely manner the information requested by the AFM on July 18, 2014 (requests 1-2, 3(b)-(c), 5-6); June 3, 4, and 17, 2015; and June 16, 2016.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of our unit employees, notify and, on request, bargain with the AFM as your exclusive collective-bargaining representative in the following bargaining unit:

> All Contract musicians, Replacement musicians, Substitute musicians, and Extra musicians employed by the Colorado Symphony Association, as described in the Agreement between the Respondent and Local 20-623.

WE WILL rescind the changes in your terms in conditions of employment that were unlawfully implemented on October 20, 2014.

WE WILL rescind the changes in your terms and conditions of employment that were unlawfully implemented on September 7, 2015.

WE WILL make whole our unit employees for any loss of earnings and other benefits suffered as a result of our unlawful unilateral decisions to: implement our June 23, 2014 contract proposal; have musicians work on the "Oh Heck Yeah," "Dona Nobis Pacem/Missa Mirabilis," "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra," and "Gregory Alan Isakov with the Colorado Symphony" media projects without following the applicable AFM media agreement; change national media terms and conditions of employment in our collective-bargaining agreement with the Denver Musicians Association, Local 20-623, plus interest.

WE WILL reimburse our unit employees and former unit employees for any expense resulting from our failure to make contributions to benefit funds required under the IMA or applicable AFM agreement.

WE WILL make all required benefit fund payments or contributions that we have failed to make because of our unlawful unilateral changes to bargaining unit employees' terms and conditions of employment.

WE WILL recognize, and on request, bargain with the AFM as your exclusive collective-bargaining representative in the appropriate unit concerning terms and conditions of employment, and if an understanding is reached, embody that understanding in a signed agreement.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

COLORADO SYMPHONY ASSOCIATION

The Board's decision can be found at www.nlrb.gov/case/21-CA-140724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Michelle Devitt and *Angie Berens, Esqs.,* for the General Counsel.
Jeffrey Freund and *Patricia Polach, Esqs.,* for the Charging Party.
Patrick Scully and *Jonathon Watson, Esqs.,* for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. The dispute in this case arises out of the efforts of the Colorado Symphony Association (the CSA or Respondent) and the American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (the AFM) to negotiate a successor collective-bargaining agreement concerning national media. As described in more detail below, I have found that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, in 2014–2016:[1] failing and refusing to provide various information that the AFM requested concerning Respondent's media plans and projects; unilaterally implementing its initial contract proposal in the absence of a valid impasse; unilaterally changing the terms and conditions of employment for musicians when they work on national media projects; dealing directly with musicians about the terms and conditions of employment for national media projects; and withdrawing recognition from the AFM as the bargaining unit's collective-bargaining representative for national media issues.

STATEMENT OF THE CASE

This case was tried in Denver, Colorado, on August 15–19 and September 12–14, 2016. The AFM filed the charges at issue here on the following dates:

Case	*Charge Filing Date*
27–CA–140724	November 10, 2014
27–CA–155238	July 1, 2015
27–CA–161339	October 6, 2015 (amended on November 25, 2015, and May 24, 2016)
27–CA–179032	June 27, 2016 (amended on July 1, 2016)

On May 26, 2016, the General Counsel issued a consolidated complaint covering cases 27–CA–140724, 27–CA–155238, 27–CA–161339, and 27–CA–168029. In an amended consolidated complaint filed on July 22, 2016, the General Counsel added Case 27–CA–179032. Finally, on July 29, 2016, the General Counsel issued a third amended consolidated complaint covering cases 27–CA–140724, 27–CA–155238, 27–CA–161339, and 27–CA–179032.[2]

In the July 29, 2016 consolidated complaint, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by:

(a) failing and refusing to provide information in response to information requests that the AFM submitted (or verbally articulated) on July 18, 2014, June 3, 4 and 17, 2015, and June 16, 2016;
(b) on or about October 20, 2014, implementing its opening proposal for a successor electronic media collective-bargaining agreement without first bargaining with the AFM to an overall good-faith impasse;
(c) in or about February 2014, recording a video game soundtrack called "Oh Heck Yeah" and compensating bargaining unit musicians who worked on that project in a manner that was not consistent with the terms of the applicable AFM agreement, without first notifying the AFM and affording the AFM an opportunity to bargain with Respondent about the changes and their effects;
(d) in or about June 16, 2016, releasing a CD titled "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra" (recorded by Respondent in August 2014) and compensating bargaining unit musicians who worked on that project in a manner that was not consistent with the terms of the applicable AFM agreement, without first notifying the AFM and affording the AFM an opportunity to bargain with Respondent about the changes and their effects;
(e) on one or more occasions in 2014 and 2015, recording video and audio of bargaining unit musicians playing in accompaniment to folk recording artist Gregory Alan Isakov for the CD entitled "Gregory Alan Isakov with the Colorado Symphony" and for a related music video for the track "Liars,"[3] and compensating bargaining unit musicians who worked on those projects in a manner that was not consistent with the terms of the applicable AFM agreement, without first notifying the AFM and affording the AFM an opportunity to bargain with Respondent about the changes and their effects;
(f) on one or more occasions in March 2014, recording bargaining unit musicians playing the piece "Dona Nobis Pacem" by composer Vaughan Williams and/or the piece "Missa Mirabilis" by composer Stephen Hough, and compensating bargaining unit musicians who worked on those projects in a manner that was not consistent with the terms of the applicable AFM agreement, without first notifying the AFM and affording the AFM an opportunity to bargain with Respondent about the changes and their effects;
(g) on or about September 7, 2015, changing bargaining unit musicians break times, service length, and per-service compensation and credit for recording session services without first notifying the AFM and affording the AFM an opportunity to bargain with Respondent about the changes and their effects;
(h) between October 2014 and June 2015, bypassing the AFM and engaging in direct dealing with unit employees over application of the terms of Respondent's opening proposal for a successor electronic media collective-bargaining agreement, including but not limited to revenue sharing terms;
(i) in or about early September 2015, bypassing the AFM and

[1] Most of the events in this case occurred in 2014 and 2015, unless otherwise indicated.

[2] With the General Counsel's approval, the Denver Musicians Association Local 20–623, American Federation of Musicians of the United States and Canada, AFL–CIO/CLC (the DMA) withdrew the charge in Case 27–CA–168029.

[3] In its posttrial brief, the General Counsel withdrew its allegation in the complaint concerning the "Liars" music video. (GC Posttrial Br. at 4 fn. 3.)

dealing directly with unit employees by meeting with members of the DMA's negotiating committee to bargain over musicians' terms and conditions of employment for audio visual media production, including the unit's break times, scheduling and service credits for recording sessions; and

(j) on or about June 17, 2016, withdrawing its recognition of the AFM as the joint exclusive collective-bargaining representative of the bargaining unit.

Respondent filed a timely answer denying the alleged violations in the July 29, 2016 consolidated complaint.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

FINDINGS OF FACT[5]

I. JURISDICTION

Respondent, a nonprofit corporation with an office and place of business in Denver, Colorado, operates a symphony orchestra. Respondent annually derives gross revenues available for operating expenses in excess of $1 million and annually purchases and receives products, goods and materials at its Denver, Colorado facility that are valued in excess of $5000 and come directly from points outside the State of Colorado. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the AFM and the DMA are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The Colorado Symphony Association

Since 1990, the Colorado Symphony Association (CSA) has been a full time symphony orchestra based in Denver, Colorado.[6] Jerome (Jerry) Kern became co-chair of the CSA board of trustees in 2011, and became the CEO of the CSA in 2013. For some of its history, the CSA has struggled with precarious finances. Because of those financial concerns, one of Kern's goals as the CEO has been to identify ways for the CSA to bring in more revenue, including (among other strategies) finding opportunities for the CSA to work on and earn money from various media projects. (Tr. 10–11, 580–583, 951, 1442–1446, 1450–1451; GC Exh. 88 (p. 3); R. Exh. 14.)

2. The AFM

The AFM is an international union that represents musicians who perform in a broad variety of settings.[7] The AFM's symphonic services department interacts with employers (like the CSA) who hire musicians to perform symphonic, operatic and/or ballet music. In addition, the AFM's symphonic services department negotiates and administers the AFM's national symphonic media agreements, which generally set the terms and conditions of employment that apply when a symphony does certain media projects. Thus (for example), if a symphony wishes to record a live symphonic performance for a CD, the AFM's symphonic services department would approve the project and ensure that the symphony compensates its musicians properly for their work on the project (including revenue sharing payments that may kick in once the symphony recoups its direct costs for the project). The national symphonic media agreements include, but are not limited to:

Integrated Media Agreement (2009–2013) (the IMA)
Integrated Media Agreement (2015–2017) (the Employers Media Association IMA)
Symphonic Limited Pressing Agreement
Symphony Opera Ballet Audio Visual Agreement
Symphony Opera Ballet Internet Agreement

[4] The transcripts and exhibits in this case generally are accurate. However, both the General Counsel and Respondent made requests (found in their posttrial briefs) to correct the trial transcripts in this matter. In addition, during my review of the record, I also identified transcript corrections that are warranted. Given the absence of any objections and the lack of any conflicts between the parties' requested corrections, I hereby grant the General Counsel's and Respondent's requests to correct the trial transcript to the extent indicated in Appendix B, which is a list of transcript corrections that is attached to this decision.

I note the following corrections regarding the exhibit files: (a) the file labeled "Employer Exhibits" should be labeled "Charging Party Exhibits"; (b) General Counsel exhibits 105, 106 and 107 were erroneously included in the General Counsel exhibit file and instead belong in the rejected exhibit file (notwithstanding the Charging Party's argument that GC 107 should be admitted into evidence (see CP Posttrial Br. at 97 fn. 44) – I stand by my decision to reject that exhibit on grounds of relevance (see Tr. 1440) and also hearsay); and (c) although the rejected exhibits were placed in an envelope marked as "sealed," the "sealed" designation is not warranted.

[5] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

[6] In 1990, musicians and community members formed the CSA as a community orchestra after the Denver Symphony went bankrupt in 1989. (Tr. 546, 580, 1442–1443.)

[7] In light of the broad spectrum of musicians that the AFM represents, the AFM has five "player conferences," which essentially are groups of musicians with similar interests who meet periodically to discuss issues of concern and provide input to the AFM about AFM contracts (including media agreements). The AFM's player conferences are: International Conference of Symphony Opera Musicians (ICSOM – for musicians in large or medium budget orchestras, including the CSA); Organization of Canadian Symphony Musicians (OCSM—for musicians in Canadian orchestras); Regional Orchestra Players Association (ROPA—for musicians in smaller budget or regional orchestras); Recording Musicians Association (RMA – for musicians involved in the music recording industry); and the Theater Musicians Association (TMA– for musicians involved in theater). (Tr. 81–84, 347–348, 507–508, 609–610, 758–760.)

In former DMA president Pete Vriesenga's view, other player conferences were reluctant to advocate for expanding media opportunities (such as allowing more flexible contract terms for symphonies like the CSA) without the approval of the RMA. (Tr. 588–589.) AFM officials Jay Blumenthal and Deborah Newmark disagreed, asserting that the RMA has no role in setting the AFM's negotiating priorities for symphonic media. (Tr. 83, 626, 726–727, 759–761; see also Tr. 81–83, 757–761 (noting that ICSOM and ROPA representatives do work with the AFM when the AFM bargains about symphonic media).)

Symphony Opera Ballet Live Recording Agreement
National Public Radio Agreement
Radio to Noncommercial Agreement

(Tr. 53–58, 73–75, 614–615.)

The AFM also has an electronic media services division that negotiates and administers non symphonic agreements, including but not limited to:

Basic Cable Agreement
Commercial Announcements Agreement (a.k.a. "Jingle Agreement")
Industrial Film Agreement
Public Television Agreement
Sound Recording Labor Agreement (SRLA)[8]
Television/Video Tape Agreement
Theatrical Motion Picture Agreement
Video Game/Interactive Media Agreement

(Tr. 55, 62–63, 75–79, 521–522, 615, 747–748; GC Exhs. 47, 52.) While symphonies can sign on to and perform work under those agreements, other entities can as well (such as major record labels that might sign the SRLA; film companies that might sign the Theatrical Motion Picture Agreement; and video game producers that might sign the Video Game/Interactive Media Agreement). (Tr. 63, 66, 75–79, 302, 493; see also Tr. 160–161, 474–475, 957 (noting that the AFM typically negotiates these agreements with multiemployer groups in the relevant industry – e.g., the AFM negotiates the Theatrical Motion Picture Agreement with a group of movie producers—but symphonic employers could also choose to participate in the negotiations).) In 2002, 2005, and 2008, the CSA signed or accepted (via letter of acceptance) the terms of various versions of the Sound Recording Labor Agreement. (Tr. 80, 133–136; GC Exhs. 17–19.)

3. The Colorado Symphony Association's relationship to the AFM and the DMA

As Respondent stated in one of its position statements, the CSA "has a bargaining relationship with two unions, both of which represent the same CSA musicians: the Denver Musicians Association (the 'DMA'), the local organization that represents employees with respect to live performances and other 'local' issues, and the AFM, which has an agreement with the CSA concerning 'national' issues like electronic media." (GC Exh. 88 (p. 3) (Respondent's January 8, 2015 position statement).) The predicate for the DMA's and the AFM's respective duties is set forth below.

For several years, the CSA has recognized the DMA as the sole and exclusive collective-bargaining representative for all contract musicians employed by the CSA, as well as all replacement musicians, substitute musicians, and extra musicians (as those terms are defined in the collective-bargaining agreement).[9] (See GC Exhs. 53 (p. 2) (2013–2015 collective-bargaining agreement in which the CSA explicitly recognized the DMA), 55 (p. 2) (same, for 2010–2013 collective-bargaining agreement); see also Tr. 529, 576–578, 580 (indicating that the CSA has bargained with the DMA since the 1990s).) Consistent with that recognition, the CSA has signed multiple collective-bargaining agreements with the DMA since the 1990s, with the most recent collective-bargaining agreement being in effect from July 1, 2013, through June 30, 2015. (GC Exhs. 53, 55; Tr. 84, 510–511, 529, 576–578, 580.)

The CSA's collective-bargaining agreement with the DMA addresses a variety of terms and conditions of employment concerning live performances and other "local issues." In addition, the collective-bargaining agreement obligates the CSA to comply with the applicable AFM national recording agreement when the CSA engages in certain types of audio and video recording work. The collective-bargaining agreement states as follows concerning that issue:

> **AFM National Recording Agreements:** The CSA shall be a signatory to all appropriate AFM national recording agreements, including, but not limited to, the Sound Recording Labor Agreement (SRLA), the Symphonic Limited Pressing Agreement (SLPA), the Symphony Opera Ballet Live Recording Agreement, and the Symphony Opera Ballet Audio-Visual Agreement. All audio and video recording work shall be done in accordance with the AFM national recording agreements.

(GC Exh. 53 (Article 14.1); see also Tr. 170, 872–875, 955–958; GC Exh. 2 (Article 1(B)(1).)

On May 31, 2010, the CSA and the AFM signed the Symphony, Opera or Ballet Orchestra Integrated Media Agreement (Integrated Media Agreement or IMA), which was in effect from October 1, 2009, to September 30, 2013.[10] In signing the IMA, the CSA recognized the AFM as the exclusive collective-bargaining representative of musicians employed by the CSA concerning the wages, terms and conditions that apply when the CSA creates audio and audio-visual media covered by the IMA. (GC Exh. 2 (Article 2); Tr. 91, 514–515.) Notably, the IMA states that the local collective-bargaining agreement may not include any provisions are less favorable to musicians than any provisions set forth in the IMA (i.e., a local union such as the DMA cannot undercut or waive the terms of the IMA). (GC Exh. 2 (Article 34). AFM bylaws also prohibit a local union

[8] The SRLA includes a symphonic section that the AFM's symphonic services department administers. (Tr. 55.)

[9] The evidentiary record does not establish when (or whether) CSA musicians voted in a state or federal election to select the DMA and/or the AFM as their collective-bargaining representative(s). (See Tr. 408–409, 931, 1066, 1599 (four witnesses were not aware of or could not recall such an election).)

[10] The IMA is the successor agreement to the following three agreements: the Symphony Opera Ballet Live Recording Agreement; the Symphony Opera Ballet Audio-Visual Agreement; and the Orchestra Internet Agreement. The AFM negotiated the terms of the IMA with a group of symphonic employers that did not include the CSA. The multiemployer group's authority expired, however, before the terms of the IMA were finalized. Subsequently, the AFM finalized the terms of the IMA, and several symphonic employers (including the CSA) independently agreed to sign the agreement. (Tr. 72–73, 84–88, 91, 95, 376–377, 753–754, 1311–1312; R. Exh. 2 (pp. 1–2); see also Tr. 95–98, 101–102, 104–117, 119–123, 125–126, 128–131 (noting that the CSA has signed various media agreements with the AFM, including the predecessor agreements to the IMA); GC Exhs. 3–5, 7–15, 45.)

from enacting contract terms on issues that are under the AFM's jurisdiction unless the AFM consents.[11] (Tr. 166–170, 536–537, 739–740; GC Exh. 23 (AFM bylaws, including Article 14.4(b), which discuss the AFM's authority over local unions who wish to include provisions about electronic media services in their local collective-bargaining agreements); see also Tr. 696–697, 738–739, 851–853 (indicating that in June 2013, after the Vancouver local union entered into a contract that was not approved by the AFM, the AFM placed the Vancouver local union in trusteeship and brought charges under AFM bylaws against certain Vancouver local union officers).)

B. CSA Musician Wages and Compensation (before October 20, 2014)

1. The CSA weekly wage scale

Generally speaking, the CSA pays a weekly salary to its contract musicians.[12] For each week of work, musicians are expected to perform between seven and nine "services," such as rehearsals, performances or recording sessions. Unless an exception applies, a service lasts for up to 2-1/2 hours, and no more than two services can be scheduled in 1 day. (GC Exh. 53 (Articles 6.1, 6.3, 7.3); see also Tr. 149, 151, 524–525, 919, 1000.)

When CSA musicians work on CSA media projects, the musicians typically have been entitled to up-front payments (among other compensation) in addition to their weekly salaries. (See Tr. 1451, 1503–1504.) The CSA offsets some of those up-front payments by including an electronic media guarantee (EMG) payment in musicians' weekly salaries. Specifically, when the CSA has its musicians work on certain noncommercial electronic media projects that are eligible for EMG (a project's eligibility for EMG depends on the terms of the AFM's national recording agreements), the CSA can use the EMG as a credit towards what the musicians are owed for their work on the project. The CSA pays musicians the EMG in their weekly salaries regardless of whether the CSA uses the EMG as a credit to pay musicians for their work on media projects. If the CSA uses up all EMG funds for a particular year, then the CSA must pay its musicians directly for any outstanding amounts owed for media project work. (GC Exh. 53 (Articles 4.1, 4.9); Tr. 165–166, 993–995.)

The CSA weekly wage scale (including EMG) historically has not covered work on commercial media projects. Consistent with that history, the CSA has not counted work on commercial media projects as weekly services that musicians agree to perform in exchange for their weekly salaries.[13] Instead, commercial media projects have been treated as extra work that CSA musicians perform for additional compensation (above and beyond the musician's weekly salary) according to the terms of the applicable AFM agreement. (Tr. 524–525, 920, 1009–1011, 1034, 1451, 1503–1504.)

2. The CSA's success sharing plan

In the 2013–2015 local collective-bargaining agreement (as well as in earlier collective-bargaining agreements), the CSA agreed to a "success sharing plan." Under the success sharing plan, if the CSA ran a surplus in its overall budget for a particular fiscal year, the CSA agreed to distribute that surplus to eligible musicians and administrative staff, provided that the musicians received at least 50 percent of the payout. In practice, the CSA rarely made payments to musicians and staff under the success sharing plan because in most years the CSA did not run a surplus. Specifically, although the CSA has offered a success sharing plan for approximately 25 years, the CSA has only made success sharing payments to musicians and staff in 3 of those years (with one payment in the early 1990s being in the $2000 range per recipient, and the other two payments being in the range of a few hundred dollars). CSA musicians have not received any payments from the CSA's success sharing plan since 2014. (GC Exh. 53 (Article 4.14); Tr. 226–227, 645–646, 1012, 1246–1247.)

3. Compensation for media projects covered by the IMA

In general, the IMA applies when a symphony (like the CSA) aims to produce and release audio or audio-visual recordings based on live symphonic, opera or ballet performances or archival tapes of those live performances. (GC Exh. 2 (Article 1(A); Tr. 93–94, 518–519, 521, 1294–1297; see also Tr. 520 (noting that a live session recording may include a recording done during a rehearsal).) For the project to be covered by the IMA (as opposed to another AFM media agreement), the symphony must retain ownership of the master recordings and the copyright for the recordings in question, but may license a third party to distribute or broadcast the recordings for a defined period of time. The IMA explicitly states that audio studio recordings are not covered by the IMA, and are instead covered by the Sound Recording Labor Agreement or another relevant AFM agreement. (Tr. 153–155, 628; GC Exh. 2 (Article 1(B)(2)); see also, e.g., GC Exh. 2 (Article 10(A)).)

Depending on the nature of the IMA media project, the symphony compensates musicians with (a) an up-front payment based on a percentage (typically between one and eleven percent) of the symphony's weekly pay scale or, in the case of a television broadcast, based on a charge per each minute/hour of the broadcast; (b) a contribution to the AFM employers' pension fund; and (c) a share of the net revenue for the project, with musicians receiving 60 percent of the revenue for a symphonic project after the symphony recovers the direct costs that it invested in the project. (GC Exh. 2 (Articles 9–16, 20); Tr. 145–146, 148–149, 151–153, 1010, 1297–1298; see also GC Exh. 2 (Article 23) (noting that a symphony may use its EMG

[11] The CSA, of course, is not bound by the AFM's bylaws. The bylaws do, however, apply to the DMA. (Tr. 739–740, 972–973.)

[12] In the 2013–2014 and 2014–2015 seasons, the CSA paid its contract musicians a base salary of $1000.83 per week. (GC Exh. 53 (Article 4.1).)

[13] The practice of counting work on a commercial media project (or work on some other type of project outside the scope of the local collective-bargaining agreement) as one of a musician's weekly services is called "service conversion." The AFM media agreements do not address or countenance service conversion as a method for compensating musicians for work on commercial media projects. (Tr. 896, 1009, 1031, 1034.)

to make the up-front payments required for a particular project).)[14]

4. Compensation for other media projects (not covered by the IMA)

If a symphony does a media project that is not covered by the IMA, then the IMA requires the symphony to compensate its musicians as specified in the applicable AFM agreement (e.g., if musicians are recording music for a video game, then the symphony compensates the musicians as specified in the AFM Video Game/Interactive Media Agreement). Notably (and among other differences), the musician compensation rates for non-IMA projects tend to be hourly session rates that are higher than the compensation rates for projects covered by the IMA, in part because the IMA is structured to allow symphonies to do symphonic media projects at lower rates, and in part because AFM wishes to ensure that its musicians receive the same type of compensation when working on similar projects (e.g., if a symphony has its musicians play music for a movie soundtrack, then the AFM has an interest in ensuring that those musicians receive the same compensation that a group of non-symphonic musicians would receive if they worked on the soundtrack). In addition, AFM agreements include provisions that may entitle musicians to receive royalties or other back-end payments as additional compensation for the musicians' work on media projects. (GC Exh 2 (Articles 1(B), 6); Tr. 158–160, 349, 522–524, 624, 751, 1010–1011, 1298, 1585; see also Tr. 158, 436–437, 495–496 (noting that for certain projects, a third party may sign on to the applicable AFM agreement and thus take responsibility for paying symphony musicians what they are owed for their work on the project).)

5. CSA's work on media projects before 2013

To keep track of symphony media projects and ensure that symphonies compensate their musicians according to the correct media agreement, the AFM requires symphonies to seek the AFM's approval before starting a project. The AFM also requires symphonies to file "B" forms that provide information about the project, including but not limited to information about the compensation that will be paid to each musician. (Tr. 54, 56–58, 155–157, 500, 550–551, 702, 863, 982–983; (GC Exh 2 (Article 6).)

Before 2013, the CSA engaged in media projects on a very limited basis. In 1999, however, the CSA submitted a B form to the AFM about a project covered by the Symphony, Opera & Ballet Audio Visual Agreement (a predecessor to the IMA). (GC Exh. 22; Tr. 143–144.) Similarly, in 2006 and 2008, the CSA submitted B forms to the AFM about two projects under the Sound Recording Labor Agreement (or one of its predecessors): a symphonic location recording; and an opera location recording. The CSA advised the AFM of the wages and pension contributions that it would pay for each of those projects. (GC Exhs. 20–21; Tr. 137–139, 141–142.)

C. Fall 2013 – The IMA Expires and the CSA asks the AFM to Bargain a New Contract that is Specific to the CSA

1. The IMA expires and the CSA asks the AFM to bargain a new contract

On September 30, 2013, the IMA expired according to its terms. Since the CSA wished to increase its revenue and build its "brand" by doing more media projects, the CSA hoped to negotiate a new contract that would give it more flexibility to pursue and set terms for media projects. Accordingly, on or about October 4, 2013, Kern contacted AFM President Raymond Hair and expressed the CSA's interest in bargaining an individualized media contract (i.e., a contract only between the CSA and the AFM). (Tr. 171, 368, 537–538, 586–587, 763, 1131–1132, 1451, 1453; GC Exh. 2.)

2. The CSA and the DMA discuss strategy for the CSA to gain more flexibility with media projects

In the same early-October timeframe, leadership of the CSA and the DMA discussed how the CSA might achieve its goal of securing more flexibility with media projects. Although DMA President Pete Vriesenga (as well as other DMA members) supported the CSA on that issue, Vriesenga questioned whether the DMA could bargain away the language in the local collective-bargaining agreement that required the CSA comply with the applicable AFM agreement when doing media projects. CSA Executive Vice President Evan Lasky agreed, observing that even if the CSA and DMA removed language about media projects from the local collective-bargaining agreement, the CSA would still need to negotiate in good faith with the AFM for a new media agreement. Lasky asserted, however, that if the CSA and the AFM reached an impasse, then the CSA could turn to the DMA to negotiate a media agreement. (GC Exh. 54 (discussing GC Exh. 53 (Article 14.1); Tr. 538–542, 586–587, 992–993, 1452).)

3. The AFM's response to the CSA's bargaining request

In late October 2013, Hair responded to the CSA's bargaining request by explaining that the AFM would be tied up with negotiating a successor to the IMA with a new, multiemployer group called the Employer's Media Association (EMA). Hair suggested that the CSA join the EMA for those negotiations. Kern declined the invitation to join the EMA, and also advised Hair that the CSA did not wish to delay bargaining while the AFM negotiated with the EMA. Kern also asked the AFM to provide dates in November 2013, for bargaining, and advised that the CSA would be willing to travel to New York for some of the negotiating sessions. (Tr. 171, 176–177, 377, 762–764, 768, 771–773, 1453–1454; GC Exh. 59–61.)

D. Late 2013 through Early 2014 – the CSA and the AFM Continue to Disagree about Starting Bargaining for a Successor to the IMA

In December 2013, Kern renewed the CSA's request to bargain with the AFM for a media agreement that would succeed

[14] For symphonies that are interested in having the flexibility to make and license several audio or audio-visual recordings, the IMA has an "audio buffet" option under which the symphony pays musicians three percent of their annual base salary. Even under the audio buffet, the symphony still must retain ownership of the master recordings and copyright. (GC Exh. 2 (Article 18); Tr. 156–157.)

the IMA and be tailored to the CSA's needs.[15] Hair, however, encouraged the CSA to participate in the AFM's negotiations with the EMA under a coordinated bargaining arrangement. Kern declined that option, but expressed interest in having the CSA attend the AFM/EMA negotiations as an observer. That alternative also failed to bring the AFM and the CSA together for bargaining because the EMA was not willing to allow the CSA to attend negotiations merely as an observer. On January 27, 2014, Kern therefore repeated the CSA's request to bargain directly with the AFM. (GC Exhs. 62–63; R. Exhs. 11–12; Tr. 632, 774–779, 1239–1240; see also Tr. 1129–1130.)

On February 7, 2014, Hair wrote Kern to suggest that the CSA send a few of its musicians to observe the AFM/EMA negotiations as guests of the AFM. In connection with that suggestion, Hair asserted that given the broad scope of the AFM's negotiations with the EMA, "there is no meaningful proposal the [AFM] can make to – or entertain from – the Colorado Symphony until the fullest examination of all the issues has occurred in the multi-faceted national context and the EMA negotiations are done." Thus, although the AFM was willing to negotiate individually with the CSA, the AFM did not plan to propose bargaining dates with the CSA until after the EMA negotiations concluded. (R. Exh. 9; Tr. 467, 632–633, 781–782, 845–846, 1133–1135.)

On February 18, 2014, Kern sent a letter to Hair to object to the AFM's plan to delay bargaining with the CSA until the AFM concluded negotiations with the EMA, and to request information about collective-bargaining agreements with symphonies where the AFM negotiated different terms than the IMA. The February 18 letter stated as follows:

> Dear Mr. Hair:
>
> This is in reply to your letter of February 7, 2014. In that letter, the [AFM] refuses to engage in direct, individual bargaining with the [CSA] over a successor agreement to the expired national [IMA], unless and until the AFM concludes negotiations with the [EMA].
>
> The [CSA] considers this to be a refusal to bargain in good faith, in violation of the National Labor Relations Act. The [CSA] is eager to begin negotiations with the AFM and to conclude a successor agreement as soon as possible. Given that the IMA – which the [CSA] individually signed – expired almost five months ago, the AFM's continued refusal to meet with the [CSA] individually until the EMA negotiations have concluded is unreasonable.
>
> Should you continue to refuse to bargain with the [CSA], the Symphony will file unfair labor practices charges with the National Labor Relations Board.
>
> Thus, we renew our request to begin bargaining with the AFM as soon as possible, and certainly before the end of March 2014. Please provide us with dates on which AFM negotiators will be available to begin these negotiations. We suggest that they occur in Denver, Colorado.
>
> Additionally, in preparation for those negotiations, the [CSA] requests that you provide copies of all current collective bargaining agreements which the AFM has with any symphony, orchestra or other, similar entity, which covers or addresses any of the topics which the IMA covers or addresses, and which differ from the IMA in any respect. As I am sure you are aware, the NLRA's duty to bargain in good faith encompasses your duty to provide information relevant to our negotiations. Please provide this information on or before March 5, 2014.

(GC Exh. 24; see also Tr. 193, 785–786.) On March 5, 2014, the AFM sent the CSA copies of collective-bargaining agreements that were responsive to the CSA's information request. (Tr. 193, 195, 786; see also Tr. 752–755 (noting that the AFM previously has negotiated unique media agreements with individual symphonic employers.)

E. February—April 2014—Communications about Media Projects and the Status of Bargaining

1. February 2014—Vriesenga and Gagliardi debate about AFM media agreement structure

In February 2014, Vriesenga spoke with AFM Executive Board Member Tino Gagliardi at an AFM conference. AFM Symphonic Services Director Jay Blumenthal was present for part of the conversation. During the discussion, Vriesenga, who was a staunch advocate of giving orchestras and musicians more flexibility to engage in commercial media projects (see R. Exh. 7), questioned why the AFM required smaller orchestras like the CSA to comply with the same media agreements as larger orchestras like the New York Philharmonic. Gagliardi responded with words to the effect of "if you think your little Colorado orchestra is going to get into this recording business then you're in for a surprise." The following day, Blumenthal apologized to Vriesenga for Gagliardi's "passionate" remarks. (Tr. 591–592, 601–602, 694–695; see also Tr. 347.)

2. The "Take the Field" project dispute and communications between the CSA and the AFM about the status of bargaining

In or about early April 2014, the AFM learned through publicly available sources that the CSA recorded a musical piece titled "Take the Field" for the Colorado Rockies major league baseball team to play during home games. Since the AFM believed that the CSA did not comply with the terms of the IMA for the Take the Field media project (e.g., by using the music for purposes not covered by the IMA, and by not compensating CSA musicians based on the appropriate AFM agreement), AFM Symphonic Electronic Media Director Debo-

[15] By this time period (if not before), the AFM was aware that the CSA had an interest in doing media projects under terms that the CSA hoped to negotiate outside of the guidelines set forth in the AFM's media agreements. Indeed, in December 2013, AFM Symphonic Electronic Media Director Deborah Newmark and Symphonic Services Director Jay Blumenthal met with CSA musicians in Denver. At the meeting, Newmark and Blumenthal explained the benefits of having the AFM negotiate the IMA and other national media agreements, including the benefit (from the AFM's perspective) of maintaining consistent workplace standards. Some musicians voiced their support for the CSA's goal of having the flexibility to do various media projects, and at least one musician asked whether the AFM could simply look the other way if the CSA negotiated its own terms for one or two commercial media projects each year. (Tr. 172–175, 466, 597, 629–631, 714.)

rah Newmark sent Kern a letter on April 11, 2014, to file a grievance about the Take the Field project. (GC Exh. 104 (pp. 4, 8–13); Tr. 528, 1138, 1271–1273, 1497–1498; see also R. Exh. 7 (indicating that CSA musicians supported doing the Take the Field project).) The AFM also sent a letter to the Colorado Rockies to question whether the Colorado Rockies could use the Take the Field recording. Upon learning of the AFM's communication with the Colorado Rockies, Kern called Newmark and asserted that the AFM was interfering with an important business relationship of the CSA. (Tr. 1273, 1447–1449, 1480, 1498.)

On April 23, 2014, Kern sent a letter to Newmark to respond to the Take the Field grievance, and also to comment about the status of the CSA's request for bargaining. After expressing skepticism about the merits of the grievance but nonetheless agreeing to process the grievance under the IMA,[16] Kern stated as follows about the status of bargaining:

> . . . I note that the [CSA] repeatedly has requested to meet with the AFM to bargain a successor agreement to the IMA. In my last letter on this point, dated February 18 and addressed to Raymond M. Hair, Jr., I asked that the AFM provide bargaining dates before the end of March. Although the AFM responded to that letter's request for certain information, we have had no response to the request for bargaining dates. The AFM's refusal to meet with [CSA] negotiators, and its position that it will not do so unless and until the [EMA] negotiations conclude, constitutes a refusal to bargain in good faith. Given that the IMA expired at the end of September 2013, unless the AFM promptly provides dates for bargaining with the CSA, we will assume that the AFM does not wish to bargain a successor agreement, has waived its right to do so, and that the [CSA] is free to institute changes to the terms and conditions of employment addressed by the IMA. Therefore, on or before Friday, May 2, 2014, provide me a list of dates when AFM negotiators are available to meet with [CSA] negotiators here in Denver, Colorado to bargain a new agreement.

(R. Exh. 15.)

Kern's letter prompted a response from Patricia Polach[17] (one of the AFM's attorneys) about the status of bargaining. In her letter, Polach stated, in pertinent part, as follows:

> Dear Mr. Kern:
>
> This firm represents the [AFM]. The [AFM] has asked us to reply to the last paragraph of your April 23, 2014 letter to Deborah Newmark, in which you assert that if the [AFM] does not provide you with a list of bargaining dates in Denver by May 2, the [CSA] "will assume that the [AFM] does not wish to bargain a successor agreement, has waived its right to do so, and that the [CSA] is free to institute changes to the terms and conditions of employment addressed by the IMA."
>
> [Summary of the AFM's efforts to bargain with the CSA.]
>
> The [AFM] took the steps described above in an effort to meet at reasonable times and in reasonable places to facilitate meaningful negotiations with the [CSA]. President Hair's February 7 letter accurately described the fundamental framework of [AFM] media negotiations. The [AFM] represents musicians in orchestras of every size and type across the nation when they create electronic media, and it also represents non-orchestra musicians in other electronic media industries. Electronic media, by its very nature, is national in scope, and therefore the maintenance of professional working standards in electronic media requires the careful balancing of multiple interests every time the [AFM] is at the table. The practical reality is that whenever the [AFM] bargains with the [CSA], it will have to be cognizant of the national context. That does not mean that the bargaining won't be individualized (as you must know from the [AFM] agreements that were provided to you in response to your information request, and which reflect numerous individualized arrangements tailored to individual orchestras' circumstances), but it does mean that it will not be in isolation.
>
> In these circumstances, and with the backdrop of facts laid out above, President Hair's February 7 assurance that he would provide dates "as expeditiously as possible after conclusion of the EMA negotiations" is neither a bad faith refusal to bargain, nor a waiver of its bargaining right. It is a reflection of the practical reality that bargaining with the [CSA] will be more meaningful at that time. Nor, given these circumstances, can the [CSA] be free to institute unilateral changes to the IMA. While the [AFM] has responded to your information request, there have been no substantive proposals, there have been no substantive discussions, there can be no impasse, and, as described above, there is neither union bad faith nor union waiver. If the [CSA] engages in unilateral implementation, the [AFM] will file unfair labor practice charges with the National Labor Relations Board.

(R. Exh. 4; see also Tr. 391–392.)

3. The AFM's letter to the CSA musician's orchestra committee about the status of bargaining

Also in April, CSA Orchestra Committee Chairperson John Kinzie wrote to the AFM to raise questions about the status of bargaining between the CSA and the AFM for a successor contract to the IMA. Kinzie's inquiry prompted the following response from the AFM:

[16] Ultimately, in May 2014, the CSA denied the AFM's grievance about the Take the Field project. (See GC Exh. 104 (pp. 5–7).)

[17] The General Counsel called Polach to testify as a witness in its rebuttal case. Contrary to its assertion in its posttrial brief (see R. Posttrial Br. at 2 fn. 5), Respondent did not object when the General Counsel called Polach as a witness (on the ground that Polach's presence during trial as one of the AFM's attorneys violated the sequestration order that I issued, or otherwise). (See Tr. 8–9, 1556.) I do not find that it was improper for Polach to testify. However, as with any witness who is permitted to be present during trial proceedings despite a sequestration order (such as a witness that a party designates as essential to assisting the party with presenting its case during trial), Respondent is free to argue that Polach's testimony should carry less weight.

> Dear Mr. Kinzie,
>
> We are in receipt of your letter of April 2, 2014, in which you raised questions about the bargaining of a successor to the [IMA] between the [AFM] and [the CSA]. We want to assure you the [AFM] will negotiate the terms of a national media agreement with the [CSA] at arm's length and under circumstances indicative of good faith bargaining. The [AFM] has a duty, however, to ask questions when it appears the labor-management relationship is subject to conflicting loyalties such that arm's length dealing may be illusory.
>
> We are keenly aware of the history of the Colorado Symphony. We know that several musicians, including some principal players, are also members of the [CSA's] board of trustees. At least one of the orchestra musicians is an executive officer of the Association. . . . We understand that the dual role of musicians as management representatives grew out of the orchestra's emergence from a bankruptcy. The [AFM] has not interfered with this evolution, nor has it been a *per se* barrier to a bargaining relationship with [the CSA].
>
> Our concerns about the current bargaining environment arise in the context of what we have heard and not heard recently from Colorado Symphony musicians. We have heard, for example, that the musicians want more choices for increasing income through media projects. . . . And we have heard that the musicians want a media agreement that provides for nationwide exploitations under terms that are custom-tailored for the [CSA].
>
> What we have not heard from your orchestra are any specific ideas for media projects that are not currently covered by an AFM agreement. The musicians have not articulated to us any strategy for increasing their national media exposure without undermining the standards in wages and conditions of fellow musicians, which we are bound to uphold . . .
>
> After many months of listening, one inference that we could draw is that the Colorado Symphony musicians expect the [AFM] to bargain a media agreement that would give the [CSA] a competitive advantage over both non-profit employers and for-profit industry producers. In the short term, this would almost certainly funnel a greater market share of recording work in motion pictures, videogames, jingles, backing of popular artists, and more to the Colorado Symphony. However, this inference, if true, would also clearly reflect a managerial objective insinuating itself into our union affairs.
>
> We believe negotiations with your employer will be more productive once the Colorado Symphony musicians have identified, articulated and prioritized their needs and wishes for electronic media. The [AFM] looks forward to assisting in the development of a plan to address those issues at the bargaining table. Meanwhile, the musicians can assist our union by putting together a negotiating team of members who are reasonably free of conflicts of interest, who are organized to bargain, and who will bargain to organize.

(R. Exh. 1; see also Tr. 361, 365–366.)

F. June 23, 2014—the CSA Proposes Language for a Successor Contract to the IMA

On June 23, 2014, CSA attorney Denise Keyser sent a letter to Hair to demand that the AFM make itself available for bargaining in Denver on or before July 15. In connection with that demand, Keyser presented the CSA's opening proposal for a new IMA and stated as follows:

> To assist the parties in moving forward toward a prompt conclusion of their direct discussions, the CSA presents its opening proposal for a new IMA, which is attached. The CSA firmly believes that successful media projects simply won't get off the ground under the terms of the expired IMA. The intent of the CSA is to procure new business opportunities for the benefit of all parties. In 2014 and beyond, the financial model for orchestras will be to make the media available and monetize it through advertising and other revenue streams. There is no longer a record company "bank" to make upfront payments, because that model was based on a market that no longer exists, *i.e.* a willingness of long-gone record labels to subsidize their classical divisions with revenue from pop hits.
>
> Therefore, it is the [CSA's] position that the complicated and costly compensation structure of the IMA should be substantially modified. For purposes of national radio and wireless audio/video broadcasts, live recordings to CDs, DVDs, or downloads for streaming, soundtracks and the licensing of archive/new material, the CSA proposes that a "front end" payment of 1% of the musicians' weekly pay scale will be provided, to be deducted from the EMG fund. Importantly, the CSA simultaneously is offering a "backend" reward for the musicians through a "Success Sharing Plan," which in the past has produced substantial additional compensation for the musicians.
>
> The CSA's proposal is bold and generous. The CSA will determine its entire financial position at the end of each year and share a portion of any net revenue-over-expenses with the musicians. This is an innovative forward-looking approach that our musicians support, because there would be new opportunities to make their performances available for licensing.
>
> The CSA continues to operate under very challenging economic circumstances, and this proposal represents [the CSA's] carefully considered thinking on how to successfully restructure burdensome provisions of the IMA to the benefit of all concerned: the CSA, the musicians, and the unions.

(GC Exh. 27 (pp. 1–2).)

Under the CSA's proposal, which was attached to its June 23 letter, musicians generally would receive the following compensation for working on media projects:

> (a) an up-front payment of 1 percent of the weekly pay scale (to be deducted from the EMG if that fund was not depleted for the year);
>
> (b) an annual payment from the CSA's "Success Sharing Plan," under which CSA musicians and administrative staff would receive a proportional share of at least 50 percent of the CSA's net income surplus if the CSA finished the year with a

profit (based on all revenues and expenses, and regardless of how successful the CSA was with each individual media project); and

(c) a contribution to the AFM pension fund on each musician's behalf.

The CSA's proposal also indicated that the CSA would retain ownership of all master recordings and copyrights for media that its musicians produced on media projects. Because the media project compensation set forth in CSA's proposal applied not only to symphonic media projects, but also to commercial media projects such as soundtracks for television, movies, video games and commercials, musicians stood to receive much lower up-front and future payments for their work on media projects than they would have received under the IMA and/or appropriate AFM agreement (e.g. the SRLA, the video game agreement, etc.). (GC Exh. 27; see also Tr. 201–204, 396, 634–636, 788–790, 1084–1085, 1143–1145, 1242–1243, 1245–1246, 1249, 1456; Jt. Exh. 1 (stipulation that until May 11, 2016, Keyser acted as the CSA's attorney and agent in correspondence and meetings with the AFM.)

G. July/August 2014—Leadup to the First Bargaining Session for a Successor Contract to the IMA

1. Efforts to schedule the first bargaining session

With the CSA's proposal on the table, in July 2014, the CSA and the AFM turned their attention to pinning down a date and a location for the first bargaining session. Initially, scheduling proved to be difficult because Hair had a busy schedule and could only meet on certain days in late July or mid-August in New York, but the CSA preferred to meet at an earlier date in Denver. After a considerable amount of back and forth, the parties agreed to meet on August 20–21 in Denver, with Newmark and Blumenthal attending as the AFM's negotiators. The AFM assured the CSA that Newmark and Blumenthal had full authority to negotiate on the AFM's behalf. (R. Exhs. 16–20, 21 (p. 1), 25–31; Tr. 177–178, 191–192, 633–634, 1146–1154, 1170–1182, 1240–1241.)

2. The AFM's July 18, 2014 information request[18]

On July 18, 2014, the AFM sent an information request to the CSA to ask for information related to the CSA's media plans and June 23 media proposal. Specifically, the AFM made the following requests:

(1) Please identify the media projects that CSA plans for the 2014–2015 season and the 2015–2016 season. As to each, please specify:
   a. The medium (e.g., radio, audio stream, CD, A-V stream, DVD, theatrical release, television).
   b. Any distribution, broadcast, artistic, financial or other partner in the project.
   c. Anticipated project budget.
   d. Repertoire.

(2) Please explain what CSA understands by the statement, "In 2014 and beyond, the financial model for orchestras will be to make the media available and monetize it through advertising and other revenue streams."

(3) Please explain what CSA means by the statement that "The intent of the CSA is to procure new business opportunities for the benefit of all parties."
   a. Please explain the meaning of a "business opportunity."
   b. Please specify any "business opportunities" obtained by CSA.
   c. Please specify any "business opportunities" or types of "business opportunities" sought by CSA.

(4) Please provide information about the EMG in effect at CSA

(5) Please describe the types of projects that would be covered by CSA's proposal for "Creation/Recording of Soundtracks."

(6) With regard to projects that would be covered by CSA's proposal for "Creation/Recording of Soundtracks," has CSA contracted for any such projects in the past? Does it have contracts or prospects for such projects in the future? Please identify and describe any such projects.

(7) Please provide any internal, consultant or expert studies, reports, memoranda, research or statements regarding actual or potential CSA media projects, the future financial model for orchestra media, new business opportunities for orchestra media, and the potential market to provide media content to third parties.

(GC Exh. 28; Tr. 1155–1156, 1558–1559.) The AFM requested this information to get a sense of what the CSA's concrete plans were for media projects and thus be in a better position to present a counterproposal. (Tr. 205–211, 428–429, 637, 791–793, 859–860, 1593.)

On July 21, 2014, the CSA provided substantive responses to items 3(a), 4 and 7 the AFM's July 18 information request. For the remaining items (1–2, 3(b)–(c), 5–6), the CSA asked the AFM to execute a confidentiality agreement before the CSA would provide a complete response. The CSA offered the following rationale for its request that the AFM sign a confidentiality agreement:

> Note at the outset that the information requested in your letter encompasses confidential and proprietary business and operational plans for the CSA. Because the AFM is in frequent contact with CSA's potential competitors, enclosed please find a proposed "Confidentiality Agreement" to be executed by the parties prior to disclosure of some of the information requested in your July 18 letter.

(GC Exh. 29.) To address the CSA's concerns about confidentiality (some of which arose from the conflict with the AFM in April 2014, about the Take the Field project), the confidentiali-

[18] On July 11, July 21 and August 6, 2014, the CSA asked the AFM to provide copies of any proposals exchanged or agreements reached between the EMA and the AFM regarding their negotiations for a successor to the IMA. On August 12, 2014, the AFM advised the CSA that the AFM had not yet concluded negotiations with the EMA, and declined to provide copies of proposals exchanged in connection with those negotiations. (GC Exhs. 25–26, 29; R. Exh. 17; Tr. 196–197.)

ty agreement that the CSA proposed included a remedy provision that stated as follows:

> The AFM agrees that the restrictions contained in this Agreement are fair and reasonable and necessary to protecting the interests of the CSA and that the CSA shall be entitled to seek injunctive relief and monetary damages, in addition to any and all other remedies permitted by law, in the event of a breach of this Agreement by AFM and/or its agents and representatives. The parties agree that any such litigation will be properly venued in the federal or local courts in the District of Colorado and that those courts will have exclusive jurisdiction over any dispute relating to this agreement.

(GC Exh. 29 (Confidentiality Agreement, par. 12); see also Tr. 211–212, 638, 794, 1158–1159, 1203, 1271–1272, 1480.) On July 22, the AFM responded that it was willing to sign an appropriate confidentiality agreement, and that the CSA's proposed agreement was "acceptable with modest changes that will conform it to standard confidentiality agreements signed with other employers." (R. Exh. 26.)

On July 23, the AFM proposed modifications to the CSA's confidentiality agreement, including replacing paragraph 12 of the agreement with the following language:

> The parties agree that money damages will not be sufficient remedy for a material breach of this Agreement, and that either party will be entitled to specific performance and injunctive or other equitable relief as remedies for any breach of this Agreement in addition to any other remedy available at law or in equity.

(R. Exh. 21.) Although the AFM's version of paragraph 12 arguably still contemplated "money damages" as a possible remedy in the event of a material breach of the confidentiality agreement, the CSA rejected the AFM's proposed changes to paragraph 12 and asked the CSA to sign the confidentiality agreement with the edits that the parties agreed upon and with the original language in paragraph 12. (R. Exhs. 21–22; Tr. 1160–1165, 1591–1593.) Thus, the CSA agreed to the AFM's proposal that paragraph 10 of the confidentiality agreement state as follows:

> AFM agrees that the Confidential Information will be used solely for the purpose of performing its duties as bargaining representative of employees of the CSA and for no other purpose other than bargaining with the CSA for the terms of a new collective bargaining agreement between the parties.

(R. Exhs. 21 (p. 4), 22.)

The AFM made another attempt at modifying paragraph 12 of the confidentiality agreement on July 24, when the AFM proposed deleting language that entitled the CSA to seek "monetary damages, in addition to any and all other remedies permitted by law." The AFM proposed that change because it did not want to be at risk of being sued for damages if the CSA lost a business opportunity and asserted that the AFM was responsible. (R. Exh. 23; Tr. 215–216, 795; see also Tr. 1571.) The CSA rejected that proposed edit, explaining:

> Although the CSA has agreed to most of the revisions you have requested, the CSA cannot agree to this revision. Under the Confidentiality Agreement, the CSA will provide the AFM with information regarding its business, which information is not known to the public, and which the Symphony regards as highly confidential. Thus, a breach by the AFM certainly could cause the CSA to lose a business opportunity (or otherwise suffer economic damages) and the CSA wishes to retain all appropriate remedies for any such breach. Please let me know if the AFM will sign the Agreement with the agreed-upon changes to paragraphs 1 & 10, with paragraph 12 as originally drafted. Thank you.

(R. Exh. 23; see also Tr. 1165–1166.)

In a letter dated August 4, 2014, the AFM asserted that its proposed version of paragraph 12 (i.e., paragraph 12 without the monetary damages language) "provided a reasonable accommodation to any confidentiality interest CSA may have in the requested information." The AFM also asserted that by refusing to delete the monetary damages language as the AFM requested, the CSA improperly "was conditioning its production of information, which is necessary to enable the AFM to evaluate and respond to the CSA's opening proposal, on the AFM's agreement to pay monetary damages in the event of a breach of the Confidentiality Agreement." The AFM again rejected the proposed monetary damages provision, and provided the CSA with an executed copy of a confidentiality agreement that did not include the monetary damages provision (but otherwise was consistent with the language that the parties agreed to). (GC Exh. 30; Tr. 216–217, 796–797, 1167.)

Between August 6 and 13, 2014, the CSA and the AFM continued to exchange letters about the confidentiality agreement, with the CSA asserting that a monetary damages clause was necessary to protect its interests, and the AFM asserting that the confidentiality agreement that it signed (without the monetary damages clause) was sufficient. Since the dispute remained unresolved, the CSA did not provide the AFM with any additional information in response to the AFM's July 18 information request. (GC Exhs. 31–33; Tr. 218–221, 640, 797, 866, 1160, 1168–1170, 1462.) During trial, both Kern and Keyser conceded that they did not know of an instance where the AFM released information in violation of a confidentiality agreement. (Tr. 1270–1271, 1497; see also Tr. 1271–1273, 1497–1498 (noting that the AFM relied on public information when it contacted the Colorado Rockies and the CSA about the Take the Field project).)

H. August 20, 2014—the AFM's and the CSA's First Bargaining Session for a Successor Contract to the IMA

At approximately 12:30 p.m. on August 20, 2014,[19] representatives of the AFM (Newmark, Blumenthal and a few musicians from the CSA musicians' orchestra committee) met with representatives of the CSA (Kern, Keyser, Jim Copenhaver, and Evan Lasky) for the parties' first bargaining session for a successor agreement to the IMA. Early in the session, Keyser

[19] The bargaining session did not start until 12:30 p.m. because the AFM requested time to meet with the CSA musicians' orchestra committee before commencing bargaining. (R. Exh. 30; see also Tr. 231, 418–419, 640–641, 715, 1182–1184.)

stressed the need to get down to business (in light of the delay since the IMA expired), and verified that Newmark and Blumenthal were authorized to negotiate and reach an agreement on the AFM's behalf. Keyser then stated that the CSA needed a signed confidentiality agreement from the AFM before the CSA could provide detailed information in response to the AFM's July 18 information request. Blumenthal noted that Hair did sign a confidentiality agreement, albeit with the monetary damages clause struck out because that clause exposed the AFM to undue risk and litigation. Blumenthal added that not having all of the information that the AFM requested was a problem because the AFM needed the information to understand the CSA's June 23 contract proposal. (R. Exh. 32 (pp. 7–8); Tr. 222–224, 422–423, 470–471, 640–643, 715, 788, 1183–1184, 1192, 1458.)

Next, Kern spoke about the CSA's previous financial troubles, and explained that with the support of its musicians, the CSA determined that it needed to be more of an entertainment company. Kern then explained that the CSA's proposal was that the CSA could do the media projects that it wanted to do (subject to musician approval), but stated that the CSA would not give specific business information to the AFM without a signed confidentiality agreement that included a monetary damages provision. Newmark reiterated that the AFM had a problem with that approach. At that point, Keyser asked the AFM if it had a counterproposal. Blumenthal demurred, answering that the summer was an extremely busy time for the AFM. Kern expressed disappointment that the AFM was not responding to the CSA's proposal. (R. Exh. 32 (pp. 7–8); Tr. 224–225, 227, 420–421, 424–425, 718, 1194–1196, 1203.)

Newmark and Blumenthal turned the discussion to the content of the CSA's contract proposal, primarily by asking what the CSA meant by various terms in the proposal. Newmark also pointed out the various ways in which the CSA would pay musicians less for their work on media projects in comparison to what musicians would be entitled to receive under the IMA or the appropriate AFM agreement (including higher up-front payments as well as back-end payments that kick in under the IMA if an individual media project is successful and the symphony recovers its costs). Kern responded that having a small up-front payment would make it easier for the CSA to do media projects, and added that while no one would receive back-end payments for media projects unless the CSA made money (in its overall budget) at the end of the year, CSA's proposal called for musicians to receive at least 50 percent of any budget surplus under the CSA's success sharing plan.[20] (R. Exh. 32 (pp. 9–11, 14); Tr. 224–229, 426–427, 643–647, 1193–1194, 1196–1199, 1204, 1459, 1481.)

After a caucus of approximately one hour, the AFM resumed questioning the CSA about the meaning of various portions of its June 23 proposal, including questions about creating and recording soundtracks, licensing, and CSA's success sharing plan. Blumenthal then asserted that the AFM was not prepared to present a counterproposal until the AFM received the information that it sought in its July 18 information request. When Keyser (after a brief caucus) responded that the CSA would not provide additional information without a confidentiality agreement that included a monetary damages clause, Blumenthal reiterated that the AFM was not willing to make a counterproposal without the information that it requested. Keyser suggested that the parties attempt to resolve the confidentiality agreement dispute in the bargaining session, but Blumenthal declined, stating that the parties' lawyers should handle that issue. Accordingly, the bargaining session ended at 3:50 p.m. (R. Exh. 32 (pp. 15–19); Tr. 229–231, 233, 419, 471–473, 641, 651, 1184, 1195, 1199–1202, 1205, 1216.)

In the morning on August 21, Blumenthal spoke with Keyser about the parties' continuing dispute about the AFM's information request and the CSA's requirement that the AFM sign a confidentiality agreement with a monetary damages clause. Because neither party was willing to change its position on those issues, Blumenthal and Keyser agreed to cancel the bargaining session that was scheduled for that day, and also agreed that the parties' attorneys (Polach for the AFM and Keyser for the CSA) would communicate about the next steps to take. (Tr. 233–234, 651–652, 1206–1207, 1261–1262.)

I. Late August 2014—Communications about Resuming Bargaining

1. Late August 2014 communications between attorneys

On August 25, 2014, Polach sent a letter to Keyser to advise her that the AFM was available to continue negotiations in New York on September 15–18, 2014. Polach also asked the CSA to produce information in response to the AFM's July 18, 2014 information request, asserting that the information was essential for meaningful and productive negotiations (particularly about the CSA's June 23, 2014 proposal). Regarding the confidentiality agreement, Polach maintained that the agreement that Hair signed (which extended to Newmark and Blumenthal) was reasonable, and added that the CSA "has no right to condition production of relevant information that is necessary for bargaining upon the AFM's execution of a [monetary] damages provision." Accordingly, Polach asked the CSA to produce the information that the AFM requested forthwith. (GC Exh. 34.)

On August 29, 2014, Keyser responded to Polach's letter. First, Keyser deemed the AFM's request for bargaining in New York to be unreasonable since the CSA and the members of its bargaining team were based in Denver. Second, Keyser asserted that the parties' August 20 bargaining session was unproductive because Newmark and Blumenthal did not offer substantive responses or a counterproposal to the CSA's June 23 proposal. Thus, while the CSA was willing to negotiate, the CSA did not see a reason to meet "until the AFM is willing to come to the table to present counterproposals and address the CSA's proposals productively." And third, Keyser stated that the CSA's request for a confidentiality agreement with a monetary damages clause was standard, and in any event the CSA's proposals were sufficiently clear that the AFM should be able to engage in productive bargaining even without the specific information that the AFM sought in its July 18 information re-

[20] As previously noted, the CSA had a similar success sharing plan in its collective-bargaining agreement with the DMA. Although musicians received very few payments under the plan, Kern asserted that the success sharing plan could still produce payments to musicians in the future. (Tr. 268–269.)

quest. (GC Exh. 94.) Polach did not respond to Keyser's August 29 letter. (Tr. 1211–1212.)

2. Late August 2014—Hair meets with CSA musician Justin Bartels to discuss the status of bargaining with the CSA

While attending an ICSOM conference in late August 2014, Newmark invited CSA musician Justin Bartels to join her and Hair for a breakfast meeting. Blumenthal also attended the meeting, as did ICSOM Media Chairperson Matthew Comerford and AFM Executive Board Member/Local 802 (New York) President Tino Gagliardi. At the meeting, Hair asked Bartels to talk to Kern to help move things along and get the parties back to talking, and also asked Bartels to arrange a meeting between CSA musicians and the AFM so the AFM could explain its bargaining position. Bartels agreed to do so. In connection with the request that Bartels speak to Kern, Hair expressed concern that the CSA's June 23 contract proposal was severe, and asked Bartels to tell Kern that the poor manner in which Kern treated Blumenthal and Newmark in the August 20 bargaining session was not going to get the parties anywhere. Hair also told Bartels that the dispute about the confidentiality agreement was holding up bargaining because the AFM needed information about the CSA's media projects to move forward. Finally, Hair stated that he was willing to bargain with the CSA about anything regarding symphonic media.[21] (Tr. 347, 798–801, 838–840, 855–856, 1522–1525, 1533–1535, 1545.)

The next day, Bartels told Kern about the breakfast meeting, and reported that Hair was willing to bargain with the CSA about symphonic media, but was not willing to bargain about commercial media projects. (Tr. 1464–1465, 1530–1531.)

J. October 20, 2014—the CSA Implements its June 23, 2014 Contract Proposal

On October 20, 2014, the CSA (through Keyser) notified the AFM that the CSA would be implementing the terms of its June 23 proposal. Keyser stated as follows in the letter:

> Dear Ms. Polach:
>
> The [IMA], the [CSA's] only collective bargaining agreement with the [AFM], expired over one year ago, on September 30, 2013.
>
> Since that date, the CSA has repeatedly requested the AFM to come to the table and bargain a successor contract. Those efforts have resulted in only a single half day of negotiations, on August 20, 2014. That session was wholly unproductive. The AFM representatives were not available until mid-day, they did not have the authority to negotiate regarding a Confidentiality Agreement proposed by the CSA, they were unprepared, and they did not offer any substantive response to written CSA proposals, which, at that point, the AFM had had in hand for almost two months.
>
> Since that session, the AFM has continued its year-long refusal to bargain in good faith, and I have had no reply to my letter of August 29, 2014.
>
> At this point, as admitted by AFM President Raymond Hair in both his October 24, 2013 email and his February [7], 2014 letter to CSA Chief Executive Officer Jerry Kern, it is clear that the AFM does not intend to bargain in good faith with the CSA unless and until it has concluded its negotiations with the EMA multi-employer group in New York.
>
> The CSA has given the AFM a more than reasonable opportunity to bargain the terms of a new collective bargaining agreement, and the business needs of the CSA require that it begin to move forward. Therefore, this letter shall serve to notify the AFM that, effective today, the CSA will implement its June 23, 2014 proposal to amend the IMA vis-à-vis the CSA.
>
> Should the AFM finally decide that it wants to begin good faith bargaining regarding the CSA's proposal, the CSA will make itself available at reasonable dates, times, and locations.

(GC Exh. 35; Tr. 1403, 1467; see also FOF, Section II(F), supra (discussing GC Exh. 27, the CSA's June 23, 2014 proposal); Tr. 1212–1215, 1468 (asserting that the CSA was also motivated to implement its June 23, 2014 proposal because, based on Bartels' report to Kern in late August 2014, the CSA believed that the AFM would not allow the CSA to do commercial media projects unless the CSA complied with the terms of the appropriate AFM agreement).) The AFM received the CSA's letter and filed an unfair labor practice charge. (Tr. 238, 241, 654–655.) The CSA, meanwhile, began doing commercial media projects under its unilaterally implemented proposal. (See FOF, Section II(T)(4)–(7), infra.)

K. October/November 2014—Responses to the CSA's Decision to Implement its June 23, 2014 Contract Proposal

1. CSA musicians meet with the DMA to discuss the CSA's implemented proposal

In late October 2014, the DMA convened a meeting for all CSA musicians to discuss the CSA's implemented proposal. At least 50 musicians attended the meeting, as did Copenhaver on behalf of the CSA and Vriesenga as the DMA president. Copenhaver explained the chain of events with bargaining that led the CSA to implement its June 23 contract proposal, and described how the proposal would apply to media projects. Copenhaver also noted that the CSA's proposal was a low and first offer to the AFM, and explained that the CSA expected

[21] The record is not clear on whether Hair also stated that he was not willing to bargain with the CSA about commercial media projects. Bartels offered ambiguous testimony on the point, first testifying that Hair "offered a hidden reference to commercial media" by referencing issues with film producers, but later testifying that Hair said he would not negotiate with the CSA about commercial media. (See Tr. 1525–1526, 1547.) Because of that ambiguity, I have not credited Bartels' testimony about what Hair said about commercial media in the breakfast meeting. I have, however, credited Bartels' testimony about what he (Bartels) told Kern about Hair's remarks. (Tr. 1530–1531; FOF, Sec. II(I)(2), infra.) To place Bartels' communications with Kern in context, I note that Bartels' stated that he (and other musicians) are very supportive of the current management of the CSA, and I also note that on May 1, 2015, Bartels filed an RC petition to have an entity called the Colorado Musicians Guild certified as the collective-bargaining representative of CSA musicians. (Tr. 1536, 1549; GC Exh. 38.)

that the parties would exchange various counteroffers. Since negotiations stalled before the CSA and the AFM reached the point of exchanging counteroffers, Copenhaver advised the musicians that the CSA was bound to implement its opening proposal as its last offer. (Tr. 554–559, 1004–1006, 1008, 1081, 1083–1084.)

After Copenhaver left the room to enable the musicians to discuss the matter, the CSA musicians expressed support (via an informal straw poll conducted by a show of hands) for the CSA management's approach. In light of what he perceived as an impasse in bargaining between the AFM and the CSA, Vriesenga suggested that the musicians bargain with the CSA directly about media projects and compensation rates since, as Copenhaver noted, the rates in the implemented proposal were low.[22] (Tr. 561–562, 573, 595, 602–603, 1082, 1096–1098; see also Tr. 1477–1478, 1507 (noting that Kern became aware that the orchestra voted to support the changes in the implemented proposal).)

2. The AFM sends representatives to meet with CSA musicians

On November 6, 2014, Blumenthal, Newmark, and Comerford met with approximately 25 CSA musicians in Denver to discuss the CSA's implemented proposal. At the meeting, Newmark explained the differences between what musicians would be paid for their work on commercial media projects under the CSA's proposal and what they would be paid for the same work under the AFM's commercial recording agreements. Blumenthal, meanwhile, talked about the importance of standing together as union members, and noted that the AFM was going to file an unfair labor practice charge concerning the CSA's implemented proposal. Some of the musicians who attended the meeting, however, indicated that they supported the CSA's new approach because the CSA was struggling financially and could benefit from new revenue from media projects. (Tr. 241–244, 414, 655–657.)

L. December 19, 2014—The AFM and the EMA Agree on a Successor to the IMA

On December 19, 2014, the AFM and the EMA concluded their negotiations and agreed to a successor contract to the IMA (the new contract has been referred to as the "EMA IMA"). (GC Exhs. 36, 36(a); Tr. 246, 618–619.) The AFM generally viewed the EMA IMA as a positive achievement. As Newmark noted in an article about the EMA IMA, at the beginning of negotiations in 2013, the EMA sought to discard much of the IMA and work out a contract that would allow symphonies to explore business opportunities that, in the AFM's view, would have undercut the terms of the AFM's commercial recording agreements such the sound recording, motion picture, television, jingles and videogame agreements. The AFM rejected that approach, which it maintained would have "allow[ed] orchestra institutions to steal work from commercial recording musicians or to undercut [the AFM's] existing agreements." (R. Exh. 8 (pp. 1–2); Tr. 461–465; see also (See R. Exhs. 2 (p. 3), 8 (p. 1).) Ultimately, the EMA IMA included some concessions to or improvements for symphonies as compared to the expired IMA, but maintained much of the expired IMA's framework, including the system of having symphonies comply with either the EMA IMA or another appropriate AFM agreement when doing media projects. (GC Exhs. 36, 36(a); see also R. Exhs. 2 (p. 3), 8 (pp. 2–3); Tr. 710–711, 1219–1220.)

M. March to May 2015 – Hair and Kern Discuss Resuming Negotiations

In March 2015, Hair asked Vriesenga find out if Kern would be willing to meet over lunch for an informal, off the record discussion. Vriesenga contacted Kern, and subsequently Hair, Kern and Vriesenga met for lunch in Denver on March 17, 2015. At the lunch, Hair explained that in light of the recently concluded negotiations with the EMA, it would be difficult to cut a special deal with the CSA on commercial media. As a courtesy (and not to impact bargaining with the CSA), Hair also gave Kern a copy of the EMA IMA and encouraged Kern to review it because the agreement had some new provisions that Kern might find of interest. Both Kern and Hair expressed a willingness to restart negotiations, but remained at odds over the AFM's information request and whether the confidentiality agreement should contain a monetary damages clause. (Tr. 446, 468, 562–564, 802–808, 866, 1469–1470, 1510–1512; see also GC Exh. 36.)

On March 23, 2015, Kern emailed Hair to follow up on their discussion at the lunch meeting. Kern stated as follows in the email:

> Dear Ray:
>
> We have reviewed the Multi-Employer Agreements which you provided me at our lunch meeting on March 17. Unfortunately, they do not meet our needs and so the CSA does not agree to them. However, as noted in prior correspondence between our counsel, the CSA remains ready and willing to meet and bargain with the AFM for a successor to the IMA. Toward that end, please contact me with suggested dates for negotiations. Prior to meeting, we would appreciate it if the AFM would provide a counter proposal to the CSA's proposal of June 2014, which has been implemented and under which we are currently operating.

(GC Exh. 67 (p. 2); see also Tr. 1472–1473.) Hair responded to Kern in an email dated April 1, 2015, stating, in pertinent part:

> Dear Jerry,
>
> In response to your [March 23 message], please know that in order to develop reasonable proposals and counter-proposals for a successor [CSA] IMA, we need the information previously requested by letter dated July 18, 2014, copy attached. You may also recall that during our lunch on March 17, which I found delightful, we both acknowledged that I signed a confidentiality agreement and agreed to keep the requested information confidential.
>
> . . .

[22] Vriesenga was reluctant to participate in future negotiations with the CSA about media projects because he was aware that the AFM had taken action against another local union in Vancouver that got involved in national media issues. (Tr. 561.)

> In checking my calendar, I find that we are available to meet with you in our offices in New York on May 7 and 8 to continue to discuss a successor [CSA] IMA agreement. Please let me know if those dates are acceptable for you.

(GC Exh. 67 (p. 1); see also Tr. 809.)

In the weeks that followed, Hair and Kern exchanged additional correspondence that reiterated the existing disagreements between the parties about (among other things) whether the AFM should sign a confidentiality agreement with a monetary damages clause, and whether the AFM could make a counterproposal without the information that it sought in its July 18, 2014 information request. Kern and Hair did not resolve those issues, but they did agree to schedule a bargaining session in Denver for June 3–4, 2015. (GC Exhs. 68–70; R. Exh. 33; Tr. 808, 810–813, 816–817, 1472–1473.)

N. March to May 2015—New DMA President Learns that the CSA and the CSA Musicians' Negotiating Committee have been Bargaining for a Successor Collective-Bargaining Agreement

1. Background—the DMA and the CSA musicians' negotiating committee

Under the 2013–2015 collective-bargaining agreement between the DMA and the CSA, CSA musicians elect an orchestra committee that "shall serve as an agent for the Local in the administration of [the collective-bargaining agreement]" and also "shall serve as a liaison between the musicians of the Orchestra and the Local." In practice, the orchestra committee may handle issues such as disputes or grievances between musicians and CSA management, or receiving notifications from the CSA about and/or approving upcoming projects or schedule changes. (GC Exh. 53 (Article 13.2(A)); Tr. 363, 511–514, 943–944, 960, 977–980, 1068–1071.)

The orchestra committee also has the authority to establish a "Negotiating Committee to negotiate the details of any extension, renewal, or modification of [the] collective bargaining agreement." (GC Exh. 53 (Articles 13.2(A), (E)); see also Tr. 412–413, 931–934, 1066–1068.) The division of labor between the DMA president and the CSA musicians' negotiating committee, however, has varied over the years regarding negotiations with the CSA for successor collective-bargaining agreements. At times (and particularly in the last 10 years), the DMA president has taken an active role in negotiations alongside the negotiating committee. (Tr. 530–531, 606–607, 876–877, 918–919, 987–991, 1013, 1071, 1074, 1091–1092.) At other times, however, the DMA president has let the negotiating committee handle negotiations with the CSA, and has only requested periodic updates on the progress of those negotiations. (Tr. 988, 1071–1074, 1101–1103; see also Tr. 582–583, 606 (noting that on various issues either the orchestra committee or the negotiating committee would meet with the CSA and then advise the DMA president (Vriesenga) after the fact).)

Regardless of whether the DMA president or the negotiating committee were taking the lead on negotiating with the CSA, both advised the CSA that it needed to contact the AFM if the CSA wished to negotiate about national media issues because those issues were under the AFM's jurisdiction (under the IMA or another national media agreement). (Tr. 514–516, 535–537, 544–549, 991–997, 1093–1094; see also Tr. 979–980, 982–983 (explaining that the local union deferred to the AFM when issues arose concerning national media projects).)

2. DMA president asks the CSA about bargaining for a successor collective-bargaining agreement

In late March 2015, Michael Allen prepared to take over for Vriesenga as the DMA president because Vriesenga was retiring. In connection with that transition and with the forthcoming expiration of the collective-bargaining agreement between the DMA and the CSA, Allen contacted Kern by letter to state as follows:

> Dear Jerry,
>
> I hope this finds you well. As you know, the current collective bargaining agreement between the [CSA] and the [DMA], covering all musicians employed by the [CSA], will expire on June 30, 2015.
>
> We propose that the contract be modified in numerous respects, and that we may work together to reach agreement on said modifications and others as you may deem necessary, resulting in a successor agreement. This letter shall serve as notice that we wish to meet with you and your representatives for the purpose of negotiating said successor agreement, and that we have indicated the same to the Federal Mediation and Conciliation Service by way of the attached document.

(GC Exh. 71; Tr. 1013, 1091–1092 (noting that, before retiring, Vriesenga worked with the negotiating committee to prepare for bargaining); see also Tr. 564–565, 869–871, 878–879, 930, 934–935; GC Exh. 53 (expiring collective-bargaining agreement).)

In a letter dated April 10, 2015, Kern replied to Allen's request for bargaining and explained that bargaining sessions between the CSA and the CSA musicians' negotiating committee were already in progress. Kern stated, in pertinent part:

> Dear Mike,
>
> This replies to your letter of March 26, 2015 requesting that the CSA and the [DMA] begin negotiations for a successor agreement to our current collective bargaining agreement. We were surprised to receive your letter, as the CSA and DMA have already begun negotiations for a new CBA. Representatives of the CSA have been meeting with the musicians' Negotiating Committee since November 2014, as per the current contract. The parties have met six times, with two more dates scheduled for later this month, and, we believe that we are very close to finalizing a new agreement. You may wish to touch base with Negotiating Committee on the progress we have made. . . .

(GC Exh. 72; see also Tr. 880, 935–936, 987, 1012–1014.) Consistent with Kern's letter, on April 10 and 21, 2015, Copenhaver emailed members of the CSA musicians' negotiating committee regarding agenda items for upcoming bargaining sessions, and specifically referenced discussions about (among other topics) "pay for subs on media projects." Negotiating committee member Paul Naslund explained that compensation

for substitute musicians was an issue for discussion because substitute musicians would not receive a bonus under the CSA's success sharing plan if the CSA finished the fiscal year with a surplus in its overall budget. (GC Exhs. 64–65; Tr. 1017–1022.)

Allen subsequently contacted negotiating committee member John Kinzie, who confirmed that the negotiating committee was bargaining with the CSA. As Kinzie stated:

> We have started the negotiations with the CSA. It is not unusual for the musicians and management to meet for negotiations without union participation. This is the most common procedure that we have used in the past unless it becomes confrontational, which it is not at all. A bit different than negotiations with some previous managements!

(R. Exh. 13; see also Tr. 880–881, 935–938, 1013–1014, 1091–1092.)

O. June 3–4, 2015—the AFM and the CSA Resume Bargaining for a Successor Contract to the IMA

1. The June 3, 2015 session

On June 3, the AFM (including Blumenthal, Newmark, and Polach) and the CSA (including Copenhaver, Kern, Keyser, and Lasky) met in Denver to resume bargaining for a successor to the IMA.[23] Polach opened the meeting by describing the history of media agreements leading up to the IMA (and the EMA IMA), and outlining the philosophy underlying those agreements. Polach then explained that, in the AFM's view, the CSA's June 2014 contract proposal threw out the rules and structure of the IMA even though those rules arose from decades of bargaining over media agreements. (CP Exh. 1 (pp. 1–5); Tr. 259–260, 662, 664, 885, 1222–1223, 1473, 1508, 1559–1560, 1584–1585.)

Polach noted, however, that the AFM had seen proposals like the CSA's before (i.e., in negotiations with other symphonies), and managed to nonetheless work out agreements by discussing specific projects that the symphony wanted to do. With that in mind, the AFM sent the CSA its July 2014 information request, which led to a year-long fight about the confidentiality agreement when the AFM's purpose had been to gather information that would enable the parties to find concrete ways to resolve their differences. Having clarified the AFM's perspective and goals, Polach reiterated the AFM's July 2014 information request, and supplemented that request in writing as follows:

> In light of the passage of time, the [AFM] makes the following supplemental information request.
>
> (1) Please identify the media projects (including any that CSA identifies as "promotional") that CSA completed in the 2014–2015 season. As to each, please specify:
>
> a. The medium (e.g., radio, audio stream, CD, A-V stream, DVD, theatrical release, television).
> b. Any distribution, broadcast artistic, financial or other partner in the project.
> c. Project budget.
> d. Repertoire.
> e. Reports filed with the [AFM], the Local or the AFM-Employers' Pension Fund.
>
> (2) Please provide the same information as detailed in (1) above for projects (including those CSA identifies as "promotional") that CSA plans for the 2015–2016 season.

Polach also provided copies of the AFM's version of the confidentiality agreement that Blumenthal and Newmark signed, and proposed that she and Keyser discuss later what information the CSA would be willing to provide. (CP Exh. 1 (p. 6); GC Exh. 39 (supplemental information request dated June 3, 2015); Tr. 263–264, 271–272, 276, 663–664, 947–948, 1078–1079, 1509, 1561–1562.)

Next, Polach presented the AFM's contract proposal. Instead of working from the CSA's June 2014 proposal, however, the AFM used the expired IMA as its starting point,[24] and made various modifications, including but not limited to: deleting language that did not apply to the CSA; increasing the amount of media recordings that the CSA could release for promotional purposes; proposing certain wage increases; and deeming broadcasts on Colorado's public radio network as "local" broadcasts that would not be subject to the national radio payments required under the IMA. Apart from those changes, however, the AFM's contract proposal retained the structure of the expired IMA, including the requirement that the CSA comply with the appropriate AFM agreement whenever the CSA did a commercial media project. ((CP Exh. 1 (p. 7); GC Exh. 37; Tr. 248–254, 264–265, 447, 483, 661–662, 664–667, 1223–1225, 1252, 1274, 1277–1279, 1474, 1564–1566, 1594; see also Tr. 256–257, 728 (explaining that although the AFM did not use the EMA IMA as its proposal in the June 3 bargaining session, some of the modifications that the AFM proposed to the expired IMA were drawn from the EMA IMA negotiations).

After reviewing the AFM's proposal, Copenhaver stated "[t]his ain't going to happen." More substantively, Keyser and Kern objected that the AFM was not addressing the CSA's proposals concerning soundtracks and other media projects, and said that the AFM was going in the wrong direction by proposing wage increases. Copenhaver added that the CSA implemented its proposal with the support of CSA musicians. Polach responded that the AFM was interested in finding common ground on some of the things that the CSA wanted to do and suggested that the parties discuss some concrete ideas. Kern then asserted that the AFM should remove its block on an RC petition that Bartels filed on May 1, 2015, on behalf of the "Colorado Musicians Guild," and have an election to see what the CSA musicians wanted to do. Keyser, however, intervened

[23] Allen was also present, as well as Bartels and Kinzie. (Tr. 259, 662, 884–885, 1222, 1559.)

[24] The AFM did not use the EMA IMA as its initial proposal to the CSA because (a) the AFM viewed the EMA IMA as the product of a year of negotiations; (b) the CSA was a signatory to the expired IMA; and (c) although the conversation was off the record, Kern rejected the EMA IMA after meeting with Hair in March 2015. (Tr. 671, 710–711, 727–728; see also CP Exh. 1 (p. 17) (indicating that Polach expressed some of this rationale to the CSA during the June 3 bargaining session).)

to clarify that the CSA was not conditioning bargaining on that issue. (CP Exh. 1 (p. 8–9); GC Exh. 38; Tr. 257–258, 265–267, 269, 664–668, 670, 886–888, 1227–1228, 1460, 1567, 1569–1570.)

After a break, Keyser suggested that the parties go through the CSA's contract proposal and discuss how (or whether) the AFM addressed each point. In connection with that part of the discussion, the AFM noted that the CSA's proposal did not include language (as in the IMA) that gave musicians a role in approving media projects. The CSA acknowledged that this might have been an oversight and stated that it was not opposed to the concept of musician approval (as opposed to only musician "review" of proposed projects). (CP Exh. 1 (p. 11); Tr. 265–266, 667, 675.)

Towards the end of the day on June 3, Keyser asked if the AFM would consider doing a "condensed" version of the CSA's proposal if the CSA offered more money up front to musicians for their work on media projects. Polach replied that the AFM might be willing to agree to some terms if the CSA "threw enough money at us," but noted that it was too soon to tell because the CSA had not indicated that it was willing to move on that issue. Copenhaver asked why the AFM did not use the EMA IMA as its proposal, since (as Keyser maintained) the EMA IMA was more favorable to symphonies. Polach responded that Kern rejected the EMA IMA after the March 2015 meeting with Hair, and also noted that Kern's and Hair's discussions in that meeting were off the record (and thus the AFM did not formally offer the EMA IMA as a contract proposal for the CSA to sign). On the other hand, Polach noted that the AFM's opening proposal to the CSA reflected what the AFM would like to see in an ideal world, and thus the AFM did not expect the CSA to accept it. At the end of the June 3 session, Keyser and Polach agreed to speak in the morning about whether the CSA might be able to disclose at least some limited information in response to the AFM's July 18, 2014 information request. (CP Exh. 1 (pp. 17, 20); Tr. 274, 665, 671–672, 1224–1228, 1249–1250, 1290–1291, 1512–1513, 1565, 1572, 1585.)

2. June 4, 2015—Keyser and Polach discuss the confidentiality agreement dispute and Polach makes a verbal information request

In the morning on June 4, Keyser and Polach spoke about the persisting dispute about whether, in connection with the AFM's information request, the AFM should sign a confidentiality agreement with a monetary damages clause. Polach noted that the AFM would accept a partial response to its information request, but without waiving the AFM's position that it was entitled to a complete response to the request. The attorneys could not agree on a partial disclosure, and remained in a stalemate because the AFM was unwilling to agree to a monetary damages clause as the CSA required before it would provide more information, and the CSA believed that the AFM already had sufficient information to negotiate with the CSA about commercial media projects. (Tr. 1230–1233, 1243–1245, 1570–1575.) Polach also verbally requested that the CSA provide "any CSA budget projections regarding possible media income, whether purely internal or shared with the CSA board or with the orchestra." (GC Exh. 40 (par. 3).)

3. The June 4, 2015 bargaining session

In the June 4 bargaining session, Kern asked Polach to outline the areas in which the AFM might have some flexibility to negotiate terms that would be specific to the CSA. Polach responded that the AFM had negotiated symphony-specific terms in the past, but noted that the AFM had only done so in exchange for the symphony's agreement to pay additional compensation to its musicians. (Tr. 672–673, 1575–1576.) Kern also asked Polach if she was prepared to negotiate a short and simple contract about commercial media agreements. Polach responded that she was not willing to do that in the abstract (or work out an agreement that would allow the CSA to undercut other organizations/entities), but could negotiate if the CSA presented her with specific information about its plans. (Tr. 945–946, 1079–1080, 1095–1096, 1103–1104, 1228–1229, 1265, 1288–1289, 1527, 1575–1580; see also Tr. 1582–1583 (noting that the AFM indicated that it was open to discussing the CSA's idea of using archived recordings of performances to create music programming for mental health institutions, regional radio broadcasts and/or patrons).)

The parties also continued discussing the relative merits of each side's proposals. Regarding the CSA's proposal, the AFM questioned whether the CSA would be able to maintain ownership of master recordings and copyrights as contemplated in the CSA's proposal when, in the AFM's experience, the companies that the CSA would be dealing with (e.g., film and video game producers) generally expected to own the rights to any media projects. The CSA dismissed that issue as a point of concern, maintaining that media project ownership questions were the CSA's problem to deal with. The AFM also questioned why the CSA thought its success sharing plan would benefit musicians, given that historically the plan had not resulted in significant payments to musicians. And, each side accused the other of making regressive proposals, with the CSA asserting that the AFM's proposal was regressive in comparison to the EMA IMA, and the AFM asserting that the CSA's request to extend its proposal to studio recordings was regressive. (Tr. 275–276, 674, 1567, 1580–1582; see also CP Exh. 1 (p. 17) (indicating that on June 3, the CSA also accused the AFM of making a regressive proposal by not using the EMA IMA as its initial proposal).)

Ultimately, the June 4 session concluded in the late afternoon without plans to reconvene for additional bargaining. Keyser and Polach, however, planned to communicate further about what the CSA would provide in response to the AFM's information request. (Tr. 276, 676–677, 1233–1234, 1572–1573, 1584; see also Tr. 663 (noting that Kern left the bargaining session early, at approximately 1:00 p.m.).)

P. June 2015—Additional Correspondence between the AFM and the CSA Regarding Information Requests

On June 17, 2015, Polach sent a letter to Keyser to follow up on their June 3–4 discussions about the AFM's original and supplemental information requests. In her letter, Polach reiterated the AFM's June 3 and 4 information requests, and noted that she, Hair, Blumenthal, and Newmark had each signed the

AFM's version of the confidentiality agreement (i.e., a version without a monetary damages clause). Polach also noted that the AFM had learned about new media projects involving the CSA, and stated as follows about that issue:

> As has happened in the past . . . , the [AFM] has learned about a new CSA media project from reading the press rather than from CSA. We understand from recent press reports that Amos Lee and TKO Records have just released (or are just about to release) a recording entitled "Live at Red Rocks with the Colorado Symphony," which was recorded at a live concert on August 1, 2014. This project surely was covered by *both* of the [AFM's] prior information requests.

(GC Exh. 40.) In light of the information about the Amos Lee project and another project for the Wyoming travel bureau, the AFM included supplemental information requests in its letter to obtain information about the two projects. Polach also suggested that she and Keyser communicate in July 2015 about dates for future bargaining sessions. (GC Exh. 40; Tr. 277.)

On June 24, Keyser responded to Polach's June 17 letter by providing some information about the Amos Lee project. The CSA noted, however, that the information that it provided about the Amos Lee project was public and thus the CSA did not view the information as covered by the disputed confidentiality agreement. As for the Wyoming travel bureau project, Keyser noted that the project occurred in 2012 and thus was not covered by the AFM's prior information requests, and in any event was completed in a matter that complied with the expired IMA. (GC Exh. 41; see also Tr. 278–279.) Keyser then stated as follows about the AFM's pending information requests and the status of bargaining:

> Finally, since its July 18, 2014 information request, the AFM repeatedly has stated that it requires detailed information about the CSA's completed and proposed media projects in order to formulate a counter proposal to [the CSA's] June 23, 2014 proposal. The AFM's regressive June 3, 2015 proposal and the Union's refusal to engage the CSA on key portions of its proposal, strongly suggests otherwise. In short, the CSA believes that the AFM has requested the information identified in your letter of June 17 (as well as the information sought in prior requests) simply as a tactic in its on-going refusal to bargain in good faith with the CSA.

(GC Exh. 41.)

In a separate letter dated June 24, Keyser responded to item 1 of the AFM's June 3, 2015 information request by providing information about three publically released media projects from the 2014–2015 season (the Amos Lee project that Keyser described in her other July 24 letter, a project entitled "The Music of Jerry Garcia," and a project entitled "Masterworks").[25] Regarding item 2 of the June 3, 2015 information request (which sought information about media projects planned for the 2015–2016 season), Keyser stated that the CSA could not produce the information that the AFM requested until the AFM and the CSA executed a "meaningful" confidentiality agreement that was consistent with what the CSA requested in prior communications with the AFM (i.e., a confidentiality agreement with a monetary damages clause). Keyser did, however, provide some general information about the CSA's work on media projects, noting as follows:

> In 2014–2015, the CSA completed a number of live and session recordings of various classical works, including Beethoven's Ninth Symphony and works by Aaron [Copland]. CSA anticipates that some of these recordings may be distributed in CD form and/or made available for digital download. In addition, the CSA also captured both audio and video related to two live performances of a classical work for a possible documentary, and it has continued its ongoing relationship with Colorado Public Radio with its Masterworks concert. These included both live broadcasts and delayed broadcasts of Masterworks concerts that were not live performances. And, CSA has engaged in "live streaming" on its website.
>
> For the 2015–16 season, the CSA also anticipates providing soundtracks for video games and film scores, and may also complete live and session recordings for CDs, digital downloads, or other media.
>
> Finally, the CSA has filed, or will file, all contractually required wage and pension reports with the [AFM], the Local, and/or the AFM-Employers' Pension Fund on a timely basis.

(GC Exh. 42; see also Tr. 280.) Apart from the June 24 letters, the CSA did not provide any additional information in response to the AFM's June 3, 2015 information request. (Tr. 280–281.)

After this round of correspondence in June 2015, the parties focused their attentions to filing and litigating various ULP charges against each other instead of making attempts at additional bargaining. (Tr. 281–282, 817–821, 1275; GC Exhs. 91–92, 95–96.)[26]

Q. Summer 2015—Ongoing Bargaining for a Successor Collective Bargaining Agreement between the CSA and the DMA

In the summer of 2015, the CSA and the CSA musicians' negotiating committee continued to discuss the parameters of a successor local collective-bargaining agreement because the existing agreement was due to expire on June 30, 2015. (GC Exh. 53; Tr. 510–511.) With that timetable in mind, and out of concern that negotiations were farther along than he was aware of, Allen emailed members of the CSA musicians' negotiating committee to state, in pertinent part:

[25] The CSA did not provide specific information about certain other media projects that arose or were in progress in the 2014–2015 season, such as the Aaron Copland project (recorded in November 2014) and the Dona Nobis Pacem/Missa Mirabilis project (recorded in March 2014, and CD released in May 2015). (See FOF, Section II(T)(2), (4), infra.)

[26] In May 2016, the AFM signed a settlement agreement in Case 27–CB–142595, a case in which the CSA alleged that the AFM violated its duty to bargain by refusing to meet at reasonable times and places. (GC Exhs. 91–92; Tr. 441–442, 486–488, 718–719, 817–819, 1275, 1589.) The AFM maintains (without rebuttal from the CSA in the evidentiary record) that the settlement agreement only applies to the AFM's bargaining conduct from October 2013 to June 2014. (R. Exh. 6 (p. 1); Tr. 818–819.)

> As you know, the DMA is the contractually designated bargaining agent representing not only the local, the AFM and all of its musicians generally, but of all the musicians of the [CSA] specifically. No matter the nature of your negotiations, the local has the right and responsibility to be privy to them.
>
> Therefore, please send me at [your] earliest convenience all written proposals and counters from both sides in regard to your ongoing negotiations.
>
> It is also important that the DMA is present at all remaining negotiation sessions. Please let me know when these are scheduled.

(GC Exh. 74; see also Tr. 889–890.)

Also on June 5, Copenhaver emailed the CSA musicians' negotiating committee to discuss the agenda for their next meeting. Copenhaver suggested that the parties could meet on either June 16 or 17, and identified the following topics for the agenda: (a) revisiting the definition of the summer season; (b) wrapping up the approach to substitute and extra musicians for both regular work and media work; (c) revisiting the EMG in light of the CSA's implemented proposal, which (unlike the expired IMA) did not use the EMG concept; and (d) a "[s]ide letter for operations until the various AFM issues resolved and a formal agreement signed off." (GC Exh. 66; Tr. 1022–1024.)

On June 6, 2015, Kinzie responded to Allen's June 5 email with the following message:

> Mike,
>
> The Negotiating Committee is fine with you joining in the next round of negotiations. We are very close to being finished, so it will mostly be observational at this point. We also don't really have documents of proposals and counterproposals, as most of our negotiation has been conversational and working together to make the organization work better. As you recall, I had asked you at our initial meeting if you were interested in joining us at that point and you responded that you were fine with us handling it and giving you reports of our progress. I think it will be good to have you there at the meetings.
>
> I will let you know of our next meeting.

(GC Exh. 74; Tr. 890.)

Kinzie subsequently advised Allen that the next bargaining session was scheduled for June 16, but Allen missed the meeting because he recorded it incorrectly on his calendar. Allen did ask the negotiating committee for a report about the June 16 meeting, but did not receive a substantive response. (Tr. 890–891.)

R. August through October 2015—the CSA and the CSA Musicians' Negotiating Committee Bargain about Working Conditions and Compensation for Recording Sessions

1. Background—recording sessions and working conditions under the 2013–2015 local collective-bargaining agreement

Under the 2013–2015 collective-bargaining agreement between the CSA and the DMA, contract musicians perform between seven and nine "services" in each week of work. Services may be rehearsals, performances or recording sessions, and generally last for up to 2-1/2 hours unless an exception applies (such as for a recording session, which can last for up to three hours and still qualify as a single service). No more than two services can be scheduled in 1 day. (GC Exh. 53 (Articles 6.1, 6.3, 7.3); see also Tr. 149, 151, 524–525, 919, 1000.) Musician work on commercial recording sessions may not be counted as a weekly service. (See FOF, Section II(B)(1), supra.)

The local collective-bargaining agreement also states that recording sessions and location recording sessions[27] must comply with the terms of the appropriate AFM agreement. (GC Exh. 53 (Articles 6.3(D)–(E), 14.1); Tr. 542–543, 895, 1489; see also Tr. 1063.) Thus, if the Sound Recording Labor Agreement is the appropriate AFM agreement for a recording session and the symphony was recording a phonograph record, the following rules apply (among others):

> (a) Compensation – each musician would be paid for the session ($421.21 for a three hour session, or $561.64 for a four hour session, in 2014); and
>
> (b) Breaks – musicians would be entitled to an average rest period of 20 minutes per hour, and could not be required to work for more than 60 minutes without a rest period of at least 10 minutes.

(GC Exh. 16 (Exh. A(I)(B)(1), (4), (7)); see also, e.g., GC Exh. 52 (pp. 65, 69) (AFM Basic Theatrical Motion Picture Agreement, setting compensation rates and break guidelines for musicians for recording sessions related to theatrical motion pictures); Tr. 1063.)

2. August 2015—the CSA and the negotiating committee discuss new guidelines for recording sessions

On August 8, 2015, Copenhaver emailed members of the negotiating committee to propose language for the local collective-bargaining agreement that would cover studio recording sessions. (GC Exh. 97.) Under the proposal, the parties would delete the requirement in the contract that recording sessions comply with the terms of the appropriate AFM agreement, and the CSA would be permitted to simply count a recording session as one of the musician's weekly services (instead of treating the session as separate work altogether). (GC Exh. 97 (p. 3); see also Tr. 1015, 1026–1028, 1031–1032.) In addition, the parties would insert the following language into the local contract:

> For all recording sessions, the following rules shall apply for the 2015–16 season only, after which time these rules may be extended or modified by a side letter:
>
> 1) Three (3)–hour services shall be counted as four services;

[27] The local collective-bargaining agreement defines a recording session as "recording work without an audience present," and defines a location recording as "recording of public performances for commercial use." (GC Exh. 53 (Article 6.3(D)–(E).)

2) Six (3)–hour services shall be counted as eight services;
3) There shall be no more than six (3)–hour services in one week;
4) Every (4)–hour service shall be counted as two services;
5) There shall be an average of 20 minutes break time for each hour of a recording service.

(GC Exh. 97 (p. 3); Tr. 1036–1039.) Copenhaver concluded his email by noting that "[w]hen we are all in agreement, as with the rest of the new CBA language, we will implement pending resolution of the AFM issues and a formal vote." (GC Exh. 97 (p. 1).)

3. September 7—the negotiating committee tells musicians about a "new agreement" that will apply to upcoming recording sessions

By September 2015, the CSA was preparing to work on a few media projects as part of the 2015–2016 season. In light of that fact, on September 7, the CSA musicians' negotiating committee (through Kinzie) emailed CSA musicians the following message about the new rules that would apply to recording sessions:

> Dear Colleagues,
>
> Your negotiating committee has been working with the CSA to finalize our new CBA. We have just about completed our negotiations, but I wanted to share our most recent agreement regarding the upcoming recordings. Once all the issues with the NLRB are finalized, we should be able to complete the negotiations, present it to you all in meetings for discussion and eventually an opportunity for ratification. This can be found under article 6 in the current CBA, so that you can compare the new language for recording services. Please feel free to ask anyone on the [negotiating committee], tomorrow or any time this week, if you have questions or concerns.
>
> [Omitted – quote of the proposal set forth above in Copenhaver's August 8 email.]

(GC Exh. 75; see also Tr. 1025–1026.)

Later on September 7, Allen received a copy of Kinzie's email from Union Steward David Brussel. Allen sent the following message in response:

> Thanks for sending this[.] I had not seen it. Of course, I haven't seen anything.
>
> I also still have not received the schedule I requested. What I really need to know is what are the recording services this week (project, composer, what kind of media is being recorded, how many players are involved, etc.). The language proposed below is in violation of the current agreement (which will remain in effect until a new agreement is ratified). If the [CSA] is recording a video game or film project this week without filing the proper contract, the proverbial poop will hit the fan.

(GC Exh. 75; see also Tr. 893–895.)

4. September 8–10—the CSA completes recording sessions for a film soundtrack

From September 8–10, 2015, the CSA completed six 3-hour recording sessions, each of which was devoted to recording a film soundtrack for a movie entitled "The Rendezvous," with music conducted by composer Austin Wintory. To figure out musician breaks and how many services the recording sessions would count for, the CSA used the guidelines set forth in Copenhaver's August 8 email. Thus, the CSA counted the six recording sessions as eight services, and ensured that musicians received an average of 20 minutes of breaktime for each hour of the recording session. CSA musicians did not provide any additional services for the week of September 7–13, 2015. (GC Exhs. 76, 90 (pp. 3–4), 97 (p. 3); Tr. 1038–1039; compare GC Exh. 52 (par. 15(b)(1) (AFM Theatrical Motion Picture Agreement, stating different rules for break time during recording sessions).)

On September 11, Copenhaver emailed the negotiating committee to advise that they would need to discuss how to adjust how break periods would be handled in recording sessions. Specifically, Copenhaver stated, in pertinent part:

> Now that we have the first of the new studio recording sessions behind us, we need to re-visit break times/duration and any other aspects of studio work. Need to be settled well in advance of the October session as [Austin] Wintory is key to promoting the [CSA] in his community. As we agreed during earlier discussions, we knew we would learn from experience and have to make some adjustments as we enter this new "line of business."

(GC Exh. 98; Tr. 1039–1040.)

5. October 2015 negotiations about recording sessions

On October 12, Copenhaver contacted members of the negotiating committee to propose agenda items for the parties' next meeting. (GC Exh. 99; Tr. 1041.) As one topic, Copenhaver suggested that the parties discuss studio recording breaks, and proposed the following revised guidelines:

> For all recording sessions, the following rules shall apply for the 2015–16 season only, after which time these rules may be extended or modified by a side letter:
>
> 1) Three (3)–hour services shall be counted as four services;
> 2) Six (3)–hour services shall be counted as eight services;
> 3) There shall be no more than six (3)–hour services in one week;
> 4) Every (4)–hour service shall be counted as two services;
> 5) Rest Period. Intermission of ten (10) minutes per hour away from stand must be given on all engagements, with the understanding that it means ten (10) minutes from the time musicians leave stands until they return and are ready to play. The Employer is privileged to accumulate two (2) rest periods, or to give two (2) fifteen (15) minute rest periods in a three (3) hour session, instead of three (3) ten (10) minute rest periods. Rest periods may not begin

> sooner than thirty (30) minutes following the beginning of session call provided that all of the employees subject to this Agreement are ready to perform at the beginning of the session. At no time shall a musician be required to perform for more than ninety (90) consecutive minutes on the stand.

(GC Exh. 99 (p. 3); Tr. 1042–1043; compare GC Exh. 52 (par. 15(b)(1) (AFM Theatrical Motion Picture Agreement, stating the same rule for breaktimes during recording sessions).).)

Copenhaver also suggested that the parties discuss how substitute and/or extra musicians would be compensated for recording sessions, and proposed the following contract language on that issue:

> Extra and Substitute musicians shall receive compensation of $110.00 for each rehearsal, performance and studio session. Three studio sessions shall count as four services and be compensated at the rate of $110 per service. Such compensation shall be changed each season after 2015–2016 at the same percentage as the scale rate for contract musicians.

(GC Exh. 99 (pp. 1, 6); see also Tr. 1016, 1033–1034, 1043–1044.) The studio session compensation rates that Copenhaver proposed for extra and substitute musicians were not consistent with the recording session rates set forth in the AFM Basic Theatrical Motion Picture Agreement or other commercial media agreements. See GC Exh. 52 (p. 65) (establishing rates that each musician is paid for a recording session under the Basic Theatrical Motion Picture Agreement, with the rate for a single session at $250 or higher); see also, e.g., GC Exh. 16 (p. 22) (same, regarding rates under the Sound Recording Labor Agreement, with the rate for a single session at $366 or higher). There is no dispute that the negotiating committee agreed to the changes that the CSA proposed regarding recording sessions. (Tr. 1087–1088, 1090–1091.)

S. June 2016—the CSA Rejects New Information Requests from the AFM about Additional Media Projects

1. June 16, 2016 information request

On June 16, 2016, the AFM sent another information request to the CSA to gather information about CSA media projects and determine if the CSA complied with the IMA or other appropriate AFM agreement when the CSA worked on the projects. (GC Exh. 43; Tr. 283–288.) The AFM explained the basis for its request as follows:

> As has happened in the past, the [AFM] has just learned about a new CSA media project from reading the press rather than from the CSA. We understand from recent press reports that Gregory Alan Isakov and Suitcase Town Music have just released (or are just about to release) an album entitled *Gregory Alan Isakov with the Colorado Symphony*. Please provide the following information about [the] project:
>
> > [Nine requests for information about the project, including but not limited to, the owner of the copyright to the recording(s), project partners, agreements or licenses governing the project, the project budget, and payments to musicians.]
>
> In addition, the [AFM] has also just become aware that in May 2015, Hyperion Records released an album on which the Colorado Symphony performed *Dona Nobis Pacem* by Vaughan Williams and *Missa Mirabilis* by Stephen Hough (apparently at Boettcher Hall in March 2014). We are at a loss to understand why the [AFM] has received no information about this project from CSA, in light of the facts that (a) on July 18, 2014, the [AFM] requested information about upcoming projects; (b) on June 3, 2015, the [AFM] made a supplemental information request specifically reiterating its request for information about projects completed in the 2014–2015 season and projects anticipated in the 2015–2016 season; and (c) on June 17, 2015, the [AFM] reiterated its June 3, 2015 request. The lack of information from CSA is all the more inexplicable, given that CSA's June 24, 2015 letter failed to inform the [AFM] *either* that CSA had recorded (or allowed the recording) of this music in 2014 *or* that the recording would be released in 2015. Having learned about the project notwithstanding CSA's apparent concealment, the [AFM] requests the following information about the recording of *Dona Nobis Pacem* by Vaughan Williams and *Missa Mirabilis* by Stephen Hough:
>
> > [Nine requests for information about the projects, including but not limited to, the owner of the copyrights to the recording(s), project partners, agreements or licenses governing the projects, the project budgets, and payments to musicians.]
>
> Finally, please identify any additional media projects which have not yet been reported to the [AFM], and as to these projects, please provide the following information:
>
> > [Ten requests for information about the projects, including but not limited to, the owner of the copyrights to the recording(s), project partners, agreements or licenses governing the projects, the project budgets, and payments to musicians.]

(GC Exh. 43; see also Tr. 283–288, 325–327.)

2. June 17, 2016 – the CSA declines to provide information to the AFM

On June 17, the CSA responded to the AFM's information request by asserting that the AFM was not entitled to the information because the AFM was not the certified bargaining representative of CSA musicians. Specifically, the CSA stated as follows:

> The CSA is in receipt of your letter dated June 16, 2016 requesting information regarding alleged "media projects."
>
> As you know, the [AFM] is not the certified bargaining representative of the musicians at the [CSA].
>
> It has come to our attention, by way of the NLRB Complaint, that AFM claims it has lawful status as the bargaining representative. As you no doubt have heard, we have denied those claims in their entirety.
>
> However, if you possess documentary or other evidence supporting AFM's claim that it has been recognized as the majority representative in accordance with the law, please present such evidence to us as soon as practicable.

> Absent such evidence, AFM has no arguable entitlement to request the information described in your correspondence.

(GC Exh. 44; see also Tr. 288–289.)

3. June 22, 2016—the AFM responds to the CSA's assertion that the AFM is not the bargaining representative of CSA musicians

In a letter dated June 22, 2016, the AFM responded to the CSA's June 17 letter and the CSA's assertion that the AFM is not the collective-bargaining representative of the CSA musicians. The AFM stated, in pertinent part, as follows in its letter:

> Your request for "documentary or other evidence" that the [CSA] has recognized the [AFM] as the bargaining representative of [CSA] musicians is surprising (to say the least), in light of the fact that CSA demanded negotiations with the AFM in October 2013 regarding terms for a successor CSA IMA.
>
> In fact, CSA has a long history of recognizing the [AFM] as the bargaining representative of its musicians with respect to the media terms and conditions covered by the many [AFM] agreements to which CSA has been a party. What follows is an illustrative, rather than a complete, list of examples demonstrating CSA's longstanding recognition of the [AFM]:
>
> > [Asserting that by signing, accepting and/or adopting various AFM media agreements such as the 2000–2003 Symphony, Opera and Ballet Audio-Visual Agreement and the 2009–2013 IMA, the CSA has agreed to contract language that recognizes the AFM as the exclusive bargaining representative of CSA musicians that the CSA employed in audio-visual media activities covered by AFM agreements.]
>
> Consistent with its longstanding recognition of the [AFM], in October 2013, CSA requested that that [AFM] enter into negotiations for a successor CSA IMA. In fact, CSA has never questioned the representative status of the AFM – until Region 27 filed its Complaint against CSA alleging multiple unfair labor practices.
>
> Simply put, there is no basis in fact for your assertion that the [AFM] is not the bargaining representative of the [CSA] musicians.
>
> Please consider the [AFM's] information request of June 16, 2016 to be reiterated, and please respond promptly.

(GC Exh. 45 (including an attached copy of the CSA's acceptance (through Copenhaver) of the 2000–2003 Symphony, Opera and Ballet Audio-Visual Agreement); see also Tr. 291.)

4. June 23, 2016—the CSA reiterates its position that the AFM is not the bargaining representative of CSA musicians

On June 23, 2016, the CSA wrote to the AFM to reiterate its position that the AFM is not the collective-bargaining representative of CSA musicians. The CSA stated as follows in its letter:

> We are in receipt of your letter dated June 22, 2016. We respectfully disagree that your submission satisfies our concerns or proves that AFM is the lawful exclusive representative of CSA's musicians. To the extent that you did not provide documents you claim are in AFM's possession, please provide them as soon as possible. We would be happy to cover any copying cost.
>
> As you undoubtedly know, there are many ways of interacting with labor organizations, but we take the rights of our musicians seriously and do not think they can be casually cast aside. The musicians clearly have not chosen AFM as their exclusive representative.
>
> As for your arguments regarding our conduct, we suspect we will be hearing more about that at trial. However, we wanted to extend the opportunity to AFM to provide evidence that it has been recognized as the majority representative in accordance with the law. You may consider this an open invitation to provide additional material.

(GC Exh. 46; see also Tr. 292–293.)

T. The CSA's Media Projects (2014–2015)[28]

1. February 5, 2014—the "Oh Heck Yeah" project

The "Oh Heck Yeah" project is a large-scale video game art piece that was available for the public to use on the downtown Denver street arcade. At the request of one of the arcade's sponsoring foundations, CSA musicians convened in Boettcher Hall on or about February 5, 2014, to play original music for the Oh Heck Yeah project in a recording session that was also open to a live audience. The CSA recorded the performance and was paid $5000 for the music and its recording (the evidentiary record does not establish who paid the $5,000 to the CSA) . CSA musician Bill Hill composed the music for the Oh Heck Yeah project. (GC Exh. 104 (p. 2); Tr. 299, 600, 1046–1047, 1089–1090, 1410–1411, 1456–1457.)

From June 7 to July 26, 2014, various Denver arts foundations arranged to have "jumbotron" video screens placed on the street arcade for the Oh Heck Yeah project. When members of the public entered the viewing area, the video screens displayed video images that changed as individuals in the viewing area moved around, while the CSA's audio recording played in the background. The Oh Heck Yeah project was intended to attract the public to Denver's theater district, engage the public in the street arcade's public art display, and get the CSA's music out to the public. There was no charge to members of the public who interacted with the Oh Heck Yeah video display. (GC Exh. 104 (p. 2); Tr. 496–497, 600–601, 603–605, 1047, 1088–1089, 1345–1347, 1349–1350, 1399–1400, 1410, 1412.)

The CSA did not compensate its musicians for their work on the Oh Heck Yeah project according to the AFM video game/interactive media agreement. (See GC Exh. 47 (Article I(1)) (stating, inter alia, that the video game agreement applies to all musicians who render services for the employer in con-

[28] A portion of the evidence presented about the CSA's media projects related to who owned the copyright to music and/or recordings after the CSA completed a media project. According to Newmark, the copyright symbol "©" represents a copyright for the underlying music, while a "p" inside of a circle represents a copyright for a particular musical recording. (Tr. 317.)

nection with preparing, producing or recording original music for use or prospective use in an "animated/interactive/video game or educational software"); see also id. (Article II(23) (indicating that basic wages for a three hour video game recording session range from $300 to $345 per musician).)[29] Instead, the CSA used the EMG to compensate its musicians, and made pension payments to the AFM pension fund. The CSA counted the recording session as one of the musicians' weekly services, and provided one 15 minute break in the middle of the recording session. CSA musicians did not receive any residual or back end payments for the Oh Heck Yeah project. (GC Exh. 104 (p. 2); Tr. 1048–1049, 1429–1430.) There is no evidence that the CSA sought or obtained the AFM's approval before starting or completing the Oh Heck Yeah project. (Tr. 299, 305; see also Tr. 240 (explaining that CSA musicians told the AFM about the Oh Heck Yeah project in August 2014).)

On November 9, 2015, CSA Vice President of Program Innovation Anthony Pierce and Oh Heck Yeah founder/creator Brian Corrigan signed a joint letter about the Oh Heck Yeah project. The letter stated as follows:

> This letter documents the agreement between the [CSA] and Oh Heck Yeah for the recorded product captured on February 5, 2014 at Boettcher Concert Hall before a live audience. Note that Oh Heck Yeah is a Public Benefit Corporation and the CSA is a 501(c)(3) nonprofit organization. This partnership was not entered into with any profit motive or commercial intent; no revenue has been generated, and none will be [] generated by the product in the future.
>
> Note that the partnership between the CSA and Oh Heck Yeah is a community benefit project that uses "the power of play" to strengthen the social, physical and economic fabric of place. No consideration was exchanged between the CSA and Oh Heck Yeah in relation to this recorded product or the partnership as a whole.
>
> The ownership of the master recordings and all copyright rights in the recording are retained by the CSA, and have not been sold or transferred to any third party including either Mr. Corrigan or Oh Heck Yeah. Further, it is understood that Mr. Corrigan and Oh Heck Yeah have no right to directly monetize the CSA performance and been granted no license or ownership interest in the performances.
>
> Mr. Corrigan is permitted under this agreement to utilize the captured product to support free community-based presentations of Oh Heck Yeah and to utilize the recorded product streaming on the Oh Heck Yeah website only for purposes of publicity and promotion of its public service mission.

(GC Exh. 101; see also Tr. 299–301 (noting that the public, without restriction, could download the Oh Heck Yeah music from the Oh Heck Yeah website), 1347, 1409–1410.)

2. March 2014—the Hyperion Records project (recordings of *Dona Nobis Pacem* by Vaughan Williams and *Missa Mirabilis* by Stephen Hough)

In mid-March 2014, the CSA (through Pierce) communicated with Hyperion records about the possibility of recording and marketing choral performances involving CSA musicians and the CSA chorus (including a future CD to be released). Although the parties did not execute a contract, Hyperion records essentially offered to compensate the CSA with (a) a 6 percent royalty on all physical and digital sales of recording; and (b) 300 CDs for the CSA to use for promotional purposes, with the CSA having the option to buy additional CDs at a price of four pounds per CD (Hyperion Records is based in the United Kingdom). Hyperion also proposed to cover the costs of recording, producing and promoting the project, and would own the copyrights to the recordings that arose from the project. (GC Exhs. 79, 85; Tr. 1338–1340, 1422–1424; see also Tr. 1407 (noting that the CSA musician orchestra committee approved doing the Hyperion Records project after being notified by the CSA).)

On March 26–30, 2014, the CSA had two rehearsals and three concerts, each of which included performances by the CSA chorus of the following two symphonic pieces: *Dona Nobis Pacem* by Vaughan Williams; and *Missa Mirabilis* by Stephen Hough. The CSA recorded the choral performances from the three concerts as part of the commercial audio recording project with Hyperion. In addition, after the March 30 concert, CSA players and the CSA chorus "returned to the stage for a patch session, scheduled for two hours and concluded after less than one hour." The CSA compensated musicians for their work on the recordings by using the EMG. The local union steward's report also states that, in making the recordings, CSA followed the guidelines set forth in the local collective-bargaining agreement (specifically Articles 4.9 (EMG), 6.3(E) (location recordings) and 14 (electronic media)). (GC Exhs. 79, 85; Tr. 1340, 1342, 1407; see also GC Exh. 53 (Articles 4.9, 14) (explaining, inter alia, that all audio and video recording work shall be done in accordance with the AFM national recording agreements, and that EMG must be used as outlined in AFM national recording agreements); Tr. 910–911, 1056–1057.)

In March 2015, a representative of Hyperion Records contacted Pierce to advise that Hyperion was prepared to send the CSA copies of the CD with the CSA's recordings of the Vaughan Williams and Stephen Hough pieces. The Hyperion Records representative noted that the contract was never executed, but nonetheless asked how many copies the CSA would like to have of the CDs (scheduled to be released in May 2015). Pierce asked the Hyperion representative to send the CSA as many CDs as possible, and did not express any objection to the lack of an executed contract. Subsequently, Hyperion Records released the CD. (GC Exh. 86; Tr. 1342–1343, 1345, 1393–1395.)

[29] During trial, Respondent questioned whether the Oh Heck Yeah project was a video game, or instead was more akin to a public art project. Newmark and Vriesenga and CSA musician Paul Naslund agreed that the Oh Heck Yeah project was a public art project, albeit in the form of an interactive video game display. (See Tr. 479, 496–497, 600–601, 603–604, 1088–1089.) In addition, Respondent admitted in one of its position statements that the Oh Heck Yeah project was "a large-scale video game" for which the CSA recorded the music. (GC Exh. 104 (p. 2).) I find that, as Respondent admitted, the Oh Heck Yeah project was a video game. To be sure, the Oh Heck Yeah project had a public arts purpose, but the project nonetheless falls squarely within the scope of the AFM video game agreement (as an interactive video game). (See GC Exh. 47 (Art. I(1).)

On an unknown date after Hyperion Records released (in or after May 2015) the recording with the Williams and Hough pieces, Allen saw the recording on ITunes and notified Newmark. Newmark and Allen each obtained a copy of the Hyperion Records CD liner notes, and observed that the CD liner notes indicate that Hyperion Records holds the copyright to the recordings from the Hyperion Records project with the CSA. The CSA did not notify the AFM before the Hyperion CD was released, and the CSA has not made any pension payments for or residual/back-end payments to, CSA musicians based on the Hyperion Records project. Further, there is no evidence that the either the CSA or Hyperion compensated musicians for their work on the project according to the SRLA or the Symphonic Limited Pressing agreement. Allen did not file a grievance to contest how the CSA handled the Hyperion Records project. (GC Exh. 51 (p. 2); Tr. 331–333, 909–913, 950–951, 1056–1057.)

3. August 2014—the "Amos Lee—Live at Red Rocks with the Colorado Symphony" project

On or about August 1, 2014, the CSA and Amos Lee performed a live concert at the Red Rocks amphitheater outside of Denver. Lee paid a flat fee to the CSA for its musicians to perform rock/folk (i.e., non-symphonic) music that Lee selected and composed. The concert was recorded for future use, and the CSA relied on the EMG to compensate its musicians for their work (based on the CSA's position that the project was covered by the IMA). The CSA did not notify the AFM before commencing the Amos Lee project, and there is no evidence that the CSA made payments to the AFM pension plan based on the project. Further, the CSA did not file paperwork with the AFM to ensure that CSA musicians were compensated in a manner consistent with the SRLA (including distributions for five years from the SRLA special payments fund). (GC Exh. 41 (pp. 1–2); Tr. 240–241, 315, 320, 479, 1049–1050, 1061, 1336, 1406; see also Tr. 318–319 (indicating that, in the AFM's view, the Amos Lee project is covered by the SRLA).)

On May 8, 2015, the CSA and Amos Lee executed a contract for Lee to purchase and use the master recordings from the August 1, 2014 concert (Lee would then deliver an album to ATO Records, LLC). The CSA transferred all copyrights to the master recordings to Lee in exchange for (among other things): (a) a royalty of 5 percent of the record company's net sales of the album, but only after the record company sold 25,000 albums at full price; and (b) a box of 300 CDs of the album at no cost. There is no evidence that the CSA provided any additional compensation to CSA musicians in light of the contract and Lee's plan to produce a CD based on the August 1, 2014 concert. The CSA musicians' orchestra committee did, however, approve the CD aspect of the project. (GC Exh. 84; Tr. 1335–1338, 1390–1392, 1406–1407; see also GC Exh. 41 (p. 1).)

On or about June 16, 2015, a record company released the "Amos Lee—Live at Red Rocks with the Colorado Symphony" CD. Consistent with its contract with Lee, the CSA did not retain the copyrights to the master recordings of the August 1, 2014 concert or to the recordings that were included on the CD. The AFM learned about the Amos Lee project and CD in June 2015, from press reports that issued about the album. (GC Exhs. 41 (p. 1), 48, 57; Tr. 313, 315–316, 677–679.)

4. October/November 2014 – the Aaron Copland project

In October 2014, the CSA negotiated with BIS Records about a media project based on the CSA's upcoming performances of symphonic pieces by Aaron Copland. As part of the preparation and negotiation process, the CSA musicians' orchestra committee approved the Aaron Copland project. In addition, the CSA coordinated with the CSA orchestra committee about scheduling, since the contemplated recording sessions would violate some of the scheduling guidelines in the local union's collective-bargaining agreement. By a majority vote on October 11, CSA musicians agreed to waive the following scheduling guidelines so they could facilitate the media project: (a) a scheduling restriction that prohibited scheduling the recording session on a Tuesday afternoon unless the CSA paid a premium to musicians; and (b) a scheduling restriction that prohibited scheduling services on more than eight consecutive days. (GC Exh. 80 (referencing Articles 7.3(B)(6) and 7.4(A) of the local collective-bargaining agreement (GC Exh. 53)); Tr. 1403; see also GC Exh. 80 (noting that in exchange for the waiver of the eight consecutive work day limitation, the CSA designated a youth concert on November 18 as an "extra" service for which participating musicians would receive extra-service compensation).)

On October 23, 2014, the CSA (through Pierce) executed a contract with BIS Records for the Aaron Copland media project. Per the contract, the CSA agreed to grant all copyrights to the recordings to BIS Records in exchange for (among other things): (a) 100 promotional copies of the recording, as well as the option to purchase additional promotional copies at the Swedish wholesale price (BIS Records is based in Sweden); and (b) a ten percent royalty on BIS Records' selling price for the recordings. The CSA retained the right to approve BIS Records' decisions on how the recordings would be used. (GC Exh. 81; Tr. 1324–1330, 1377–1378, 1382.)

From November 24–26, 2014, the CSA held five recording sessions for the Aaron Copland project (two of the sessions ran for 4 hours; the remaining sessions ran for 3 hours). The CSA counted each of those recording sessions (which also served as rehearsals for a concert held on November 28) as a weekly service. Musicians received 20–minute breaks each hour during the recording sessions, and did not receive any front-end payments from the CSA for their work on the project (apart from an EMG-like payment under the CSA's implemented October 2014 proposal). At the time of trial, CSA musicians also had not received any back-end or special fund payments based on the Aaron Copland project. (GC Exh. 80; Tr. 914–916, 1001, 1050–1052, 1330, 1420–1421; see also Tr. 1421 (indicating that under the CSA's revenue sharing plan, musicians might receive a payment if the CSA ran a surplus for its overall budget in a particular year).)

In 2015, BIS Records released a CD entitled "Copland – Colorado Symphony—Andrew Litton." Consistent with its contract with the CSA, BIS Records owned the copyright to the recordings. The CSA did not notify the AFM before starting the Aaron Copland project, file any forms or reports with the

AFM about the project, or make any payments to the AFM pension plan based on the project. (GC Exh. 49; Tr. 320–323, 325, 1418–1419; see also Tr. 323 (noting that BIS Records is not a signatory to any AFM agreements).)

5. July 2015—the Gregory Isakov project

On July 13–14, 2015, the CSA held two recording sessions at the Red Rocks amphitheater for a project with Gregory Isakov (each recording session ran for 2.5 hours). The music for the Isakov project was folk/pop in nature, and thus was non-symphonic.[30] The CSA musicians' orchestra committee approved the project, and the CSA counted each of those recording sessions as a weekly service. (GC Exh. 78; Tr. 329, 906–907, 1058–1060, 1352, 1408–1409.)

On February 3, 2016, the CSA entered into a contract with Suitcase Town Music for the Gregory Isakov project. Under the contract, the CSA agreed to grant all copyrights to the recordings for the project to Suitcase Town Records in exchange for (among other things): (a) $12,500; (b) 300 CDs (with the option to purchase additional CDs at half price); and (c) Isakov's commitment to play a concert with the CSA on January 13, 2017 (for which the CSA would pay Isakov a guarantee of $17,500, plus $4000 if the concert sold 2000 tickets, and plus an additional $3500 if the concert sold out). (GC Exh. 87; Tr. 1351, 1396–1398.) The contract also included the following language about the AFM's media agreements:

> It is agreed that the [CSA] has its own operating agreement with the musicians of the [CSA], and the national AFM recording agreements are not privy or applicable to the [CSA's] agreement with its contracted players. The [CSA] hereby warrants and represents that there will be no so-called 'reuse fees' or any other fees payable to the AFM, Musician's Guild, ACTRA or any other such unions or other entities for the use of these recordings in any manner, including without limitation third party synchronization licensing for film, television, advertising, video games, or any other type of use.

(GC Exh. 87 (p. 1).)

Later in 2016, Suitcase Town Music released a CD entitled "Gregory Alan Isakov with the Colorado Symphony." Consistent with its contract with the CSA, Suitcase Town Music (and Isakov) owned the copyrights to the CD and the recordings from the project. The CSA did not pay any residual or back-end payments to CSA musicians based on the Gregory Isakov project. (GC Exh. 50; Tr. 327–329, 1352; see also Tr. 331 (noting that Suitcase Town Records is not a signatory to the SRLA).)[31]

The AFM learned about the Gregory Isakov project in or around June 2016, after reviewing press reports about the Isakov CD release. The CSA did not provide any advance notice to the AFM about the Gregory Isakov CD release, file any forms or reports with the AFM about the project, or make any payments to the AFM pension plan based on the project. At the time of trial, CSA musicians had not received any residual or other additional payments based on the Gregory Isakov project. (GC Exh. 43; Tr. 325–326, 330–331, 1060; see also Tr. 327 (noting that after learning about the project, the AFM sent the CSA the information request discussed in FOF, Section II(Q)(1), supra).)

6. September 2015—"The Rendezvous" film soundtrack project

On September 1, 2015, the CSA entered into a contract with composer Austin Wintory to record a soundtrack for a film titled "The Rendezvous." Under the contract, the CSA agreed to grant all copyrights to the recordings for the soundtrack project to Austin Wintory in exchange for $40,000. The CSA also agreed that Wintory could make any future use of the soundtrack that he desired in connection with the film (e.g., DVD, BluRay, television/cable, theatrical release and soundtrack albums), with no residual payments or royalties due to the CSA. If, however, Wintory wished to use the soundtrack for a purpose unrelated to the film, or soundtrack sales exceeded 7,500 units, then the CSA and Wintory would negotiate in good faith about additional compensation for the CSA (such as royalties). (GC Exh. 82; Tr. 1330–1333, 1383–1384, 1390; see also GC Exh. 82 (p. 2); Tr. 1384–1387 (noting that the CSA's expenses for the soundtrack project exceeded the $40,000 compensation amount in the contract).) The contract also included the following language about the AFM's media agreements:

> It is agreed that the [CSA] has its own operating agreement with the musicians of the [CSA], and the national AFM recording agreements are not privy or applicable to the [CSA's] agreement with its contracted players.

(GC Exh. 82 (p. 2); Tr. 1333.)

From September 8–10, 2015, the CSA held six recording sessions to record a soundtrack for "The Rendezvous" (each recording session ran for 3 hours). The CSA musicians' orchestra committee approved the project and the music for the soundtrack was symphonic in nature. As previously noted, to figure out musician breaks and how many services the recording sessions would count for, the CSA (based on guidelines that Copenhaver set forth in an August 8 email) counted the six recording sessions as eight services, and ensured that musicians received an average of 20 minutes of breaktime for each hour of the recording session. The CSA followed the terms of its

[30] I do not credit Pierce's testimony that the CSA played symphonic music for the Gregory Isakov project (merely because the symphony was performing the music). (Tr. 1351–1352.) Instead, I have given more weight to the testimony from witnesses who performed with Isakov and/or heard the music on the Isakov CD associated with the project, and described the music as folk/pop and non-symphonic. (See FOF, Section II(R)(5), infra.)

[31] During trial, the General Counsel and the AFM attempted to show that Suitcase Town Records issued a music video based on the "Liars" track from the Isakov CD, and that CSA musicians were shown in the music video. The General Counsel's and the AFM's evidence on that point fell short, however, because the music video in question was posted on YouTube, and the General Counsel did not present a witness to authenticate the video or establish that the video in fact was an "official video" from Suitcase Town Music (as opposed to, for example, a bootleg video that the CSA linked to its website). (See Tr. 1300–1301, 1304–1305, 1353, 1358–1360, 1362–1364, 1367–1371.) As previously noted, the General Counsel withdrew its allegation in the complaint concerning the "Liars" music video. (GC Posttrial Br. at 4 fn. 3.)

implemented contract proposal to compensate its musicians for their work on the soundtrack, and thus CSA musicians did not receive any additional front-end, back-end or residual payments for the project. (GC Exhs. 76, 90 (pp. 3–4), 97 (pp. 1, 3); Tr. 900, 1038–1039, 1052–1054, 1404, 1456–1457; see also FOF, Section II(P)(2)–(4), supra.)

The AFM later learned about the film soundtrack project and maintains that the CSA should have followed the requirements of the AFM's Basic Theatrical Motion Picture Agreement. (Tr. 337–338; GC Exh. 52; see also Tr. 1046 (indicating that before the CSA implemented its contract proposal in late 2013, the AFM's Basic Theatrical Motion Picture Agreement would have applied to a film soundtrack project).) The AFM did not have an opportunity to address that concern with the CSA before the project, however, because the CSA did not provide any advance notice to the AFM about the film soundtrack project or file any forms or reports with the AFM about the project. (Tr. 343 (also noting that the CSA did not make any payments to the AFM pension plan based on the film soundtrack project).)[32]

7. October 2015—the "Banner Saga 2" video game score project

On October 13, 2015, the CSA entered into a contract with composer Austin Wintory to record the score for a video game titled "Banner Saga 2." Under the contract, the CSA agreed to grant all copyrights to the recordings of the video game score to Austin Wintory in exchange for $33,200 (with $30,000 allocated to the cost of CSA musicians, $1600 for the cost of a local engineer, and $1600 for the cost of venue rental).[33] The CSA also agreed that Wintory could make any future use of the video game score that he desired in connection with the video game (e.g., DVD, BluRay, television/cable, theatrical release and soundtrack albums), with no residual payments or royalties due to the CSA. If, however, Wintory wished to use the video game score for a purpose unrelated to the video game, then the CSA and Wintory would negotiate in good faith about additional compensation for the CSA (such as royalties). (GC Exh. 83; Tr. 1333–1335, 1387–1390, 1421–1422; see also GC Exh. 83 (p. 2) (noting that the CSA's expenses for the video game score project exceeded $30,000); Tr. 1389–1390 (same).) The contract also included the following language about the AFM's media agreements:

> It is agreed that the [CSA] has its own operating agreement with the musicians of the [CSA], and the national AFM recording agreements are not privy or applicable to the [CSA's] agreement with its contracted players.

(GC Exh. 83 (p. 2).) On the other hand, the CSA's contract with Wintory explicitly relied on the AFM Video Game/Interactive Media Agreement for language/guidelines on breaks for musicians:

> Note that it is agreed that breaks will be administered for the players according to the language in the AFM VIDEO GAME/INTERACTIVE MEDIA AGREEMENT. The language is as follows:
>
> > Rest Period. Intermission of ten (10) minutes per hour away from stand must be given on all engagements, with the understanding that it means ten (10) minutes from the time musicians leave stands until they return and are ready to play. The Employer is privileged to accumulate two (2) rest periods, or to give two (2) fifteen (15) minute rest periods in a three (3) hour session, instead of three (3) ten (10) minute rest periods. Rest periods may not begin sooner than thirty (30) minutes following the beginning of session call provided that all of the employees subject to this Agreement are ready to perform at the beginning of the session. At no time shall a musician be required to perform for more than ninety (90) consecutive minutes on the stand.

(GC Exh. 83 (p. 1) (emphasis in original); see also GC Exh. 47 (par. 22(d)) (Rest Period paragraph in the AFM Video Game/Interactive Media Agreement); FOF, Section II(P)(4)–(5), supra (discussing the CSA's negotiations with the CSA musicians' negotiating committee about breaks for recording sessions in fall 2015).)

From October 27–28, 2015, the CSA held four studio recording sessions to record the Banner Saga 2 video game score (each recording session ran for 3 hours). The CSA musicians' orchestra committee approved the project. The CSA counted the four recording sessions as five services, and ensured that musicians received breaks in the manner set forth in the contract with Wintory. The CSA followed the terms of its implemented contract proposal to compensate its musicians for their work on the video game score, and thus CSA musicians did not receive any additional front-end, back-end or residual payments for the project. (GC Exh. 77; Tr. 901–902, 948, 1054–1056, 1334, 1405–1406, 1421, 1456–1457; see also FOF, Section II(P)(4)–(5), supra.)

The AFM later learned about the Banner Saga 2 video game score project and maintains that the CSA should have followed all of the requirements of the AFM's Video Game/Interactive Media Agreement. (Tr. 312, 901–903; GC Exh. 47; see also Tr. 1046 (indicating that before the CSA implemented its contract proposal in late 2013, the AFM's Video Game/Interactive Media Agreement would have applied to a video game score project).) The AFM did not have an opportunity to address that concern with the CSA before the project, however, because the CSA did not provide any advance notice to the AFM about the video game score project or file any forms or reports with the AFM about the project. (Tr. 304–305, 311–313 (also noting that the CSA did not make any payments to the AFM pension plan based on the video game score project).)

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness'

[32] At the time of trial, The Rendezvous had not yet been released, though the CSA believed that the film might premier at some film festivals in fall 2016. (Tr. 1387.)

[33] The CSA did not pay these amounts directly to the musicians or local engineer. Instead, the CSA paid the CSA musicians on the project according to the terms of their contracts, and paid the local engineer his hourly rate. (Tr. 1388–1389.)

demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 60–61 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 61. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

B. Did Respondent Have a Duty to Bargain with the AFM about National Media?

In one of its position statements, Respondent admitted that it "has a bargaining relationship with two unions, both of which represent the same CSA musicians: the Denver Musicians Association (the 'DMA'), the local organization that represents employees with respect to live performances and other 'local' issues, and the AFM, which has an agreement with the CSA concerning 'national' issues like electronic media." That admission is fully consistent with the evidentiary record concerning Respondent's history of bargaining with the AFM about national media, including but not limited to: Respondent's decisions to sign or accept multiple AFM commercial media agreements (including the 2009–2013 IMA); Respondent's recognition, in the IMA that the CSA signed in 2010, of the AFM as the "exclusive collective-bargaining representative of musicians employed by the CSA concerning the wages, terms and conditions that apply when the CSA creates audio and audio-visual media covered by the IMA"; and Respondent's commitment in the local collective-bargaining agreement to be a signatory to all appropriate AFM national recording agreements. (See, e.g., FOF, Section II(A)(3); see also *Musical Arts Assn.*, 356 NLRB 1470, 1483 (2011) (relying on the history of bargaining, the recognition provisions in AFM's agreements, industry practice, AFM bylaws, and language in the local collective-bargaining agreement to find that the respondent recognized the local union and the AFM as joint collective-bargaining representatives of employees in the relevant bargaining units).)

As the General Counsel and Charging Party note, Section 10(b) of the Act bars Respondent from asserting, as a defense to the allegations in this case, that the AFM did not represent a majority of Respondent's musicians when Respondent recognized the AFM. As the Board has explained in the context of non-construction industries, "[i]f an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e. beyond the 6 months after initial recognition, on the ground [that] the union did not represent a majority when the employer recognized the union." *Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 536 (2006), enfd. 493 F.3d 515 (5th Cir. 2007); see also *Musical Arts Assn.*, 356 NLRB at 1478. That rule certainly applies here, where for several years (and at a minimum since signing the IMA in 2010), Respondent has recognized the AFM as the exclusive collective-bargaining representative of CSA musicians on issues of national media, and has demanded that the AFM bargain with Respondent about those issues.[34]

Perhaps to avoid the obstacle posed by Section 10(b), Respondent argues that the agreements that it signed with the AFM were null and void from the start. First, Respondent maintains that the IMA and its predecessor agreements are unlawful prehire agreements. (R. Posttrial Br. at 57–59.) That argument, however, is not supported by the evidence. The evidentiary record shows that Respondent employs a tenured roster of musicians. Based on its agreements with the DMA and the AFM, Respondent must comply with the AFM's national media agreements when Respondent seeks to have its musicians (who are already employed) work on a national media project. (FOF, Section II(A)(3), (B)(1).) In arguing that the IMA is a prehire agreement, Respondent disregards those facts and asserts that the IMA is void (at least as far as Respondent is concerned) because the AFM did not show that Respondent's musicians were working on media projects when Respondent signed the IMA. I find that Respondent's convoluted interpretation of the scope of the IMA lacks merit.[35] The various contracts that Respondent has signed (including the IMA and the collective-bargaining agreements with the DMA) stand for the simple proposition that when Respondent seeks to have its existing employee musicians work on national media projects, Respondent is obligated to comply with the terms of the applicable AFM media agreement.

Second, Respondent asserts that the IMA is void because the IMA is an unlawful members-only agreement (i.e., an agreement in which the AFM has only been recognized for the limited purpose of representing musicians who are AFM members, but not the interests of all musicians employed by Respondent).

[34] Respondent did not challenge the AFM's status as joint collective-bargaining representative until June 8, 2016, when Respondent filed its answer to the complaint in this case. (GC Exh. 1(aa) (par. 5(b)).)

[35] Presumably, Respondent bases its argument on the recognition clause in the IMA, which states that "the Employer hereby recognizes the [AFM] as the exclusive bargaining representative of Musicians who are employed by the Employer in the creation of audio and audio-visual media covered by this Agreement[.]" (GC Exh. 2 (Article 2).) While that clause does contain a bit of awkward prose, Respondent takes its argument too far when, based on the recognition clause, Respondent equates the IMA to a prehire agreement that Respondent signed when it did not have employees. Indeed, Respondent's circumstances here are vastly different from those at issue in *Frick Co.*, 141 NLRB 1204, 1208–1209 (1963) (a case on which Respondent relies, see R. Posttrial Br. at 58–59), where a non-construction employer signed a contract with a union before hiring any employees, and thus was not obligated to bargain with the union. Here, Respondent did have union-represented employees when it signed the IMA (see FOF, Section II(A)(3) (noting that Respondent has recognized the DMA since the 1990s))—the IMA simply sets forth contract terms that Respondent must adhere to when it directs those employees to work on a national media project.

(R. Posttrial Br. at 63–65; see also *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 1 (2015) (defining a members-only agreement), enfd. 651 Fed. Appx. 34 (2d Cir. 2016); *Don Mendenhall, Inc.*, 194 NLRB 1109, 1110 (1972) (same).) In support of that argument, Respondent asserts that the union security clause in the IMA is invalid because Respondent's musicians never participated in an election under the Colorado Labor Peace Act (a Colorado statute that establishes criteria for parties to agree to a union security clause, see *Albertson's/Max Food Warehouse*, 329 NLRB 410, 410 & fn. 1 (1999)). Thus, Respondent argues, the IMA is a members-only agreement that does not obligate Respondent to bargain with the AFM.

As a preliminary thought, I note that Respondent's argument is problematic because there is a significant distinction between a contract that has an invalid union security clause and a contract that is a members-only agreement that cannot be enforced under the Act. As the Board has held, even if a union security clause is invalid, the union is still entitled to the customary presumption of majority status. See, e.g., *Lehigh Lumber Co.*, 238 NLRB 675, 678–679 (1978), enfd. 609 F.2d 502 (3d Cir. 1979). In light of that guidance, as well as the fact that the IMA itself states that the union security clause "shall not become effective unless permitted by applicable law," it is a bridge too far to assert (as Respondent does) that any deficiencies in the IMA's union security clause result in the IMA being a members-only agreement that does not require Respondent to bargain with the AFM (as opposed to the IMA remaining in effect, but without an enforceable union security clause).

With that stated, I also find that Respondent's argument that the IMA is an unlawful members-only agreement fails because it lacks support in the evidentiary record. By its terms, the IMA covers all of Respondent's musicians who work on media projects within the scope of the IMA, and not simply those musicians who are AFM members. There is no evidence that the AFM ever negotiated for or required Respondent to follow separate contract terms for its members who work on media projects, to the exclusion of non-member musicians who were performing the same work. The cases in which the Board has declined to apply Section 8(a)(5) of the Act to a members-only agreement are therefore not applicable here. See, e.g., *Rogan Brothers Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 1, 32–34 (finding that a contract that only applied to employees who were members of a local union, but not to other employees who were not represented by that union, was not enforceable by way of Section 8(a)(5)); *Manufacturing Woodworkers Assn.*, 194 NLRB 1122, 1123 (1972) (same); *Don Mendenhall, Inc.*, 194 NLRB at 1110 (same, noting that Section 8(a)(5) requires as a predicate for finding a violation that the employee representative has been designated as the exclusive representative of the employees, and explaining that members-only agreements do not establish that predicate)).

In sum, I find that Respondent had a duty to bargain with the AFM about national media. With that foundation in mind, I now turn to the specific issues raised in this case.

C. Did Respondent Violate the Act by Refusing to Provide Complete Responses to the AFM's Information Requests?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by:

> (a) since about July 21, 2014, failing and refusing to provide information in response to the AFM's July 18, 2014 information request;
> (b) since about June 4, 2015, failing and refusing to provide information in response to the AFM's June 4, 2015 and June 17, 2015 information requests;
> (c) since about June 24, 2015, failing and refusing to provide information in response to the AFM's June 3, 2015 information request; and
> (d) since about June 17, 2016, failing and refusing to provide information in response to the AFM's June 16, 2016 information request.

(GC Exh. 1(oo) (par. 7).)

2. Applicable legal standards

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. The burden to show relevance, however, is not exceptionally heavy, as the Board uses a broad, discovery-type standard in determining relevance in information requests. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

In considering union requests for information that the employer asserts is confidential, the Board balances the union's need for the information against any legitimate and substantial confidentiality interests established by the employer. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh the requesting party's need for the information. Further, a party refusing to provide information on confidentiality grounds has a duty to seek an accommodation. *A-1 Door & Building Solutions*, 356 NLRB at 500–501; see also *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006) (explaining that confidential information includes but is not limited to: highly personal information, such as individual medical records or psychological test results; substantial proprietary information, such as trade secrets; information that could lead to harassment or retaliation, such as the identity of witnesses; and information that traditionally is privileged, such as memoranda prepared for pending lawsuits). An employer's failure to show that the union is unreliable concerning confidentiality agreements is an important factor in assessing the employer's confidentiality defense. *Reiss Viking*, 312 NLRB 622, 622 fn. 1 (1993).

3. Analysis—the AFM's July 18, 2014 and June 3, 4, and 17, 2015 information requests

As set forth in the findings of fact, on July 18, 2014, the

AFM sent Respondent an information request to ask for information that would enable it to understand Respondent's June 23, 2014 contract proposal and Respondent's plans to do more media projects. While Respondent provided information on July 21 in response to items 3(a), 4, and 7 of the AFM's request, Respondent advised the AFM that it was not willing to provide information in response to the remaining items (1–2, 3(b)–(c), 5–6) because Respondent believed that the information the AFM requested included the Respondent's confidential and proprietary business and operational plans. Respondent noted, however, that it would be willing to provide the information that the AFM requested if the AFM executed a confidentiality agreement. Although the AFM indicated that it would be willing to sign a confidentiality agreement that would limit the AFM to only using the information for the purpose of bargaining a new contract between the CSA and the AFM (but would not include a monetary damages clause), Respondent rejected that compromise and did not provide any additional information in response to the July 18, 2014 information request. Respondent did not have an objective reason to believe that the AFM would not comply with the terms of the confidentiality agreement (e.g., based on knowledge of the AFM failing to comply with similar agreements). (FOF, Section II(G)(2).)

Respondent handled the AFM's June 3, 4 and 17, 2015 information requests in a similar fashion to how it handled the AFM's July 18, 2014 request. Specifically, while Respondent (on June 24, 2015, in response to the June 3 and 17, 2015 information requests)[36] provided the AFM with information about media projects that were already public, and also provided a general description of future media projects, Respondent refused to provide specific information about any future media projects (such as projects for the 2015–2016 season) until the parties executed a confidentiality agreement that included a monetary damages clause. When the AFM declined to sign such an agreement and maintained that the confidentiality agreement that it signed (without a monetary damages clause) was sufficient, Respondent did not provide any further information in response to the AFM's June 2015 information requests. (FOF, Section II(O)(1)–(3), (P).)

Initially, Respondent asserts that it had no obligation to provide the information that the AFM requested because the information was not relevant. (R. Posttrial Br. at 92–95.) I find that Respondent's argument misses the mark. As the Board has explained, an employer's duty to bargain includes a general duty to provide information that the bargaining representative needs to assess and respond to claims that the employer makes during contract negotiations. *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011), enfd. 700 F.3d 551 (D.C. Cir. 2012); *Caldwell Manufacturing*, 346 NLRB 1159, 1159–1160 (2006). The information that the AFM sought in its July 18, 2014 and June 2015 information requests was certainly relevant under that standard (if not presumptively relevant), because the AFM needed the information to gain a better understanding of, and formulate its responses to, the CSA's June 2014 contract proposal and the CSA's underlying plans to do more media projects under terms that differed from the IMA.[37]

Turning to the question of confidentiality, I recognize that Respondent had an understandable concern about not publicizing future media projects because: (a) based on its experience with the Take the Field project, Respondent feared that the AFM might interfere with upcoming projects (e.g., by contesting whether Respondent was doing the project under contract terms that violated one of the AFM's agreements);[38] and (b) publicizing future media projects could entice competitors (such as other symphonies or musicians) to try and steal the project from Respondent. As noted above, however, the AFM had a strong need for information about Respondent's media plans so it could understand and respond to Respondent's contract proposal. In addition, the AFM offered to sign a confidentiality agreement that limited who could see the information that Respondent provided, and also stipulated that the AFM would only use the information for bargaining purposes. Although Respondent and the AFM agreed to those aspects of a possible confidentiality agreement, discussions broke down when Respondent insisted, in the absence of any basis to believe that the AFM would not comply with the confidentiality agreement, that that the AFM agree to a clause in the agreement that would permit the CSA to seek monetary damages if the AFM breached the confidentiality agreement. (See FOF, Section II(G)(2), (O)(1)–(3), (P).)

Given those facts, I find that the AFM's need for information about Respondent's media proposal and plans outweighs the

[36] Respondent did not provide information in response to the AFM's June 4, 2015 information request (reiterated on June 17, 2015) for "any CSA budget projections regarding possible media income." (FOF, Sec. II(O)(2), (P).)

[37] Respondent asserts that the AFM's did not actually need information about Respondent's June 2014 proposal because the AFM had no intention of bargaining with Respondent about commercial media projects. (R. Posttrial Br. at 93.) That assertion fails. However, because the evidentiary record shows that the AFM was willing to negotiate with Respondent about commercial media (particularly if Respondent was willing to offer more money to musicians as part of the deal) once the AFM received more information about Respondent's specific plans. (See, e.g., FOF, Sec. II(M)(1).)

Respondent also asserts that the AFM did not need the information that it requested because the AFM ultimately made contract proposals (in 2015) to Respondent without having the information that it (the AFM) requested. (R. Posttrial Br. at 97.) I am not persuaded by that argument because the AFM cannot be faulted for proceeding with negotiations as best as it could without the information that it requested about Respondent's media proposal and media plans, and there is certainly no basis for me to treat the AFM's decision to forge ahead with negotiations as a waiver of its statutory right to seek compliance with its lawful requests for information. See *Metal Carbides Corp.*, 291 NLRB 939, 952–953 (1988) (finding that a union did not waive its statutory right to pursue its information requests when it proceeded on a "Hobson's choice" and attempted to resolve grievances as best it could with the information that it had); see also *Quality Roofing Supply Co.*, 357 NLRB 789, 789 (2011) (observing that waivers of statutorily protected rights must be clear and unmistakable).

[38] The AFM relied on public, rather than confidential, information when it confronted Respondent and the Colorado Rockies about the Take the Field project. (FOF, Section II(E)(2).) Nevertheless, I understand that based on its experience with the Take the Field project, Respondent was concerned that the AFM might interfere with other media projects.

confidentiality interests that Respondent asserted about that information. Initially, Respondent raised some valid concerns about keeping its media plans confidential. The AFM, however, negotiated with Respondent about a confidentiality agreement that largely would address Respondent's confidentiality concerns. When Respondent insisted that the AFM go a step further and agree to a monetary damages clause even though Respondent lacked a basis to believe that the AFM would violate the confidentiality agreement, Respondent undermined its confidentiality defense. Specifically, Respondent's demand that the confidentiality agreement include a monetary damages clause was unreasonable because Respondent lacked a foundation to ask for it, and because the monetary damages clause was at best only tangentially related to preserving confidentiality (as opposed to, for example, negotiating limits on who could see the information and how the information could be used, and possibly redacting some information). By insisting that it would only provide the information that the AFM needed if the AFM agreed to an unreasonable damages clause provision, Respondent failed to meet its obligations under the Act. See *Albertson's, Inc.*, 351 NLRB 254, 287 (2007) (explaining that the standard in information request disputes "has its roots in reasonableness," and thus "[a]n employer has no obligation to distill and extract at great cost and inconvenience information requested by the Union in a particular manner and form, if alternatives are satisfactory," and conversely, "an employer may not with impunity needlessly make it difficult for the Union to obtain relevant information necessary to its representative role"); see also *Hospital Santa Rosa, Inc. a/k/a Clinica Santa Rosa*, 365 NLRB No. 5, slip op. at 1 fn. 1, 10 (2017) (no exceptions filed to the judge's findings that the employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information that the union requested, and that the $200,000 penalty that the respondent demanded if the union breached confidentiality had "no legitimate basis and is unreasonable on its face"); *PCA Industries, Inc.*, 1995 WL 1918057 (finding that the union's need for the information that it requested outweighed Respondent's claimed need for a confidentiality agreement with a liquidated damages clause). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to provide the information that the AFM requested in its July 18, 2014 (requests 1–2, 3(b)–(c), 5–6), and June 3, 4 and 17, 2015 information requests.[39]

4. Analysis—the AFM's June 16, 2016 information request

On June 16, 2016, the AFM sent Respondent another information request, this time seeking information about two media projects that Respondent completed in 2015 (based on public media reports that the AFM reviewed), and any other media projects that Respondent had not previously reported to the AFM. Instead of raising confidentiality concerns, Respondent stated that the AFM was not entitled to any of the information that it requested because (in Respondent's view) the AFM was not the certified collective-bargaining representative of Respondent's musicians. Consistent with that position, Respondent has not provided any information to the AFM in response to the AFM's June 16, 2016 information request. (FOF, Section II(S).)

Unlike the information July 2014 and June 2015 information requests, Respondent flatly refused (irrespective of any potential confidentiality agreement) to provide any information to the AFM in response to the AFM's June 2016 information request. The only issue, therefore, is whether Respondent was correct in asserting that it had no obligation to provide information to the AFM. As I have found, Respondent was incorrect on that point, and did have an obligation to bargain with the AFM on issues of national media. Since the AFM's June 2016 information request was directly related to its ongoing responsibilities to enforce its existing agreements with the AFM and to negotiate a successor contract to the IMA, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it refused to provide information to the AFM in response to the AFM's June 16, 2016 information request.

D. Did Respondent Violate the Act by, on October 20, 2014, Unilaterally Implementing its June 23, 2014 Contract Proposal?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about October 20, 2014, unilaterally implementing its opening, June 23, 2014, contract proposal without first bargaining with the AFM to an overall good-faith impasse for a successor collective-bargaining agreement. (GC Exh. 1(oo) (par. 8).)

2. Applicable legal standards

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. Notably, an employer's regular and longstanding practices that are neither random, nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 138–139 (2014), enfd. 807 F.3d 318 (D.C. Cir. 2015) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

[39] I also note that there is ample basis in the record for me to find that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to uphold its duty to bargain with the AFM to accommodate Respondent's confidentiality interests and the AFM's need for the information that it requested. Indeed, by insisting that the AFM sign a confidentiality agreement that included an unreasonable monetary damages clause, Respondent brought discussions of an accommodation to a standstill. See *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004); *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999). I refrain from finding this additional violation here, however, because my finding above (that Respondent unlawfully failed and refused to provide the information that the AFM requested) addresses the allegations in the complaint.

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. The party asserting impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB at 139.

3. Analysis

As set forth in the findings of fact, on August 20, 2014, Respondent and the AFM met for their first bargaining session for a successor contract to the IMA. Although the parties came to the bargaining session to discuss Respondent's June 2014 contract proposal and what the AFM might offer in response, the AFM's July 18, 2014 information request was very much at issue. Indeed, early in the bargaining session, the AFM (through Blumenthal) stated that it needed the information that it requested to understand Respondent's contract proposal. Since it did not have that information, the AFM used the bargaining session to ask several questions about Respondent's proposal. When Respondent became frustrated with that approach and asked if the AFM was going to make a counterproposal, the AFM ultimately declined, stating that it would not be able to make a counterproposal until Respondent provided the information that the AFM sought in its July 18 information request. Since Respondent was not willing to do so unless the AFM signed a confidentiality agreement with a monetary damages clause, the parties agreed to conclude the bargaining session on August 20 and forego additional bargaining on August 21. When the ongoing information request dispute prevented the parties from scheduling additional bargaining sessions, Respondent unilaterally implemented its initial, June 23, 2014 contract proposal on October 20, 2014. (FOF, Sec. II(H), (I)(1), (J).)

At the outset, I find that the parties were not at a lawful impasse on October 20, 2014, when Respondent unilaterally implemented its June 2014 contract proposal. "Under consistent Board precedent, a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties." *Caldwell Manufacturing Co.*, 346 NLRB at 1170; see also *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 2–3 & fn. 8 (2015) (explaining that the employer's failure to provide information that the union requested about a major issue in negotiations precluded a finding that the parties were at impasse); *E.I. Du Pont Co.*, 346 NLRB 553, 558 (2006) ("It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse."), enfd. 489 F.3d 1310 (D.C. Cir. 2007). Based on that precedent, a finding of impasse is certainly precluded here, where Respondent unlawfully refused to provide the AFM with information that would have enabled the AFM to understand and formulate responses to Respondent's contract proposal concerning national media projects (the core issue separating the parties). Indeed, the parties' dispute about the AFM's July 18 information request (and whether the AFM should execute a confidentiality agreement with a monetary damages clause before Respondent would provide the information that the AFM requested) was at issue throughout the August 20 bargaining session, and led the parties to forego bargaining on August 21 and refrain from scheduling additional bargaining sessions in fall 2014.[40]

Perhaps due to its awareness of the challenges associated with arguing that the parties were at impasse when Respondent implemented its June 2014 contract proposal, Respondent largely avoided the issue of whether the parties were at impasse[41] and instead argued that the AFM engaged in bad faith bargaining that privileged Respondent to implement its contract proposal unilaterally.[42] In support of that defense, Respondent faults the AFM for: (a) delaying in coming to the bargaining table (initially, from October 2013 to June 2014, because the

[40] Since it is clear that bargaining broke down in August 2014, because of the information request dispute (indeed, that was the reason that the parties cut their August 20–21 bargaining session short and did not schedule additional sessions in fall 2014), I need not reach the question of whether, as an alternative theory for there being no impasse, both parties were at the end of their rope in bargaining (based on the various factors that the Board has identified for that analysis—see *Mike-Sells Potato Chip Co.*, 360 NLRB at 139). For the same reason, I also need not address the AFM's argument that impasse is precluded due to unremedied direct dealing and unilateral change violations that Respondent committed before implementing its contract proposal. (See CP Posttrial Br. at 92–93.)

[41] Respondent did suggest that the parties were at impasse because the AFM "insisted that [Respondent] abide by the results of multiemployer bargaining and consent to the multi-employer bargaining unit," two permissive subjects of bargaining. (R. Posttrial Br. at 89–90.) It suffices to note that Respondent's argument fails because it lacks support in the evidentiary record. Negotiations in August 2014 did not break down because the AFM made an improper demand that Respondent accept the results of multiemployer bargaining—instead, negotiations broke down because Respondent unlawfully refused to provide the AFM with information relevant to the core issues separating the parties (i.e., information about Respondent's commercial media plans). Due to those circumstances, a finding of a valid impasse is precluded.

[42] Respondent also argued that the AFM waived its right to bargain with Respondent by failing to meet and bargain with Respondent from October 2013 through July 2014 (largely because the AFM wanted to first complete negotiations for the EMA IMA). (R. Posttrial Br. at 81–82.) That argument is without merit. Throughout the October 2013 to July 2014 time period, the AFM consistently stated that it intended to bargain with Respondent for a successor to the IMA (albeit on an improperly delayed timetable). For most of that period, there was no contract proposal from either side on the table. Once Respondent made its June 2014 proposal, the AFM submitted an information request about Respondent's proposal and the parties met for their first bargaining session on August 20, 2014. (FOF, Sec. II(C)–(D), (E)(2), (G)–(H).) Given those facts, Respondent misses the mark by a wide margin when it argues that the AFM failed to act with due diligence and thus waived its right to bargain, such that Respondent was privileged to unilaterally implement its initial contract proposal on October 20, 2014.

AFM wanted to complete negotiations for the EMA IMA before negotiating with Respondent, and later, in June and July 2014, when the parties struggled to agree on a date and location for bargaining); (b) only bargaining for a half-day on August 20, 2014, without making a counterproposal; and (c) making statements at and away from the bargaining table that indicated the AFM was not willing to bargain with Respondent for a contract that would permit Respondent to do commercial media projects outside of the existing framework set forth in the IMA and the AFM's other commercial media agreements.[43] (R. Posttrial Br. at 65–77.)

I do not find Respondent's arguments on this point to be persuasive. There is certainly no dispute that the AFM delayed bargaining with Respondent from October 2013 to June 2014 to focus its attentions on bargaining for the EMA IMA. Indeed, the AFM settled an unfair labor practice charge regarding that very delay. (See FOF, Sec. II(P).) By summer 2014, however, the AFM changed its behavior and actively began communicating with Respondent to schedule an initial bargaining session. To be sure, the parties had some trouble agreeing on a date and time (in part because Respondent was no longer willing to hold bargaining sessions in New York, and in part because the AFM initially worked from Hair's limited availability), but it does not follow that either side was acting in bad faith as they corresponded in summer 2014 and ultimately agreed to meet and bargain in Denver on August 20 and 21. (FOF, Sec. II(D), (E)(2), (G)(1).) As for the way things went when the parties met for bargaining on August 20, I have found (as noted above) that the session went poorly because of Respondent's unlawful refusal to provide information in response to the AFM's July 18, 2014 information request.[44] That leaves Respondent's assertion that the AFM made statements indicating an unwillingness to deviate from the existing framework of the AFM's commercial media agreements. While representatives of the AFM certainly believed strongly in the existing framework set forth in the AFM's commercial media agreements (see FOF, Sec. II(E)(1), (E)(3), (H); see also FOF, Section II(L) (remarks by Newmark in a newsletter that issued after Respondent unilaterally implemented its contract proposal)), I do not find that AFM representatives made any statements that went so far as demonstrate an unwillingness to bargain with Respondent for a different arrangement concerning commercial media (such as an agreement that would increase compensation for musicians in exchange for more flexibility for Respondent to do certain media projects on terms that differed from the AFM's media agreements), much less before October 20, 2014, when the parties had only completed one bargaining session and the AFM was still waiting for information request responses that would shed light on the specific media plans underlying Respondent's contract proposal.[45]

Since the parties were not at a valid impasse and there is no other defense that applies here, I find that Respondent violated Section 8(a)(5) and (1) when it unilaterally implemented its June 23, 2014 contract proposal on October 20, 2014, without first bargaining with the AFM to a valid impasse.

E. Did Respondent Violate the Act by Unilaterally Changing the Terms and Conditions of Employment for Musicians for Certain Media Projects without First Notifying the AFM and Affording the AFM an Opportunity to Bargain about the Changes and Their Effects?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally taking the following actions without first notifying the AFM and affording the AFM an opportunity to bargain about the actions and their effects:

> (a) in or about February 2014, recording a soundtrack for a video game called "Oh Heck Yeah" without retaining the master recording and rights to the material, and with compensation to musicians paid under the terms of the IMA instead of the AFM's video game agreement;
>
> (b) on or about June 16, 2015, releasing a CD titled "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra" through a third party commercial production company, without retaining the master recording and rights to the material (recorded in or about August 2014), and with compensation to musicians paid under the terms of the IMA instead of the AFM's Sound Recording Labor Agreement (SRLA);
>
> (c) on one or more occasions in 2014 and/or 2015, recording bargaining unit employees playing in accompaniment to the folk recording artist Gregory Alan Isakov for a CD titled "Gregory Alan Isakov with the Colorado Symphony," without retaining the master recording and rights to the material, and without compensating musicians under the terms of the SRLA;
>
> (d) on one or more occasions in March 2014, recording bargaining unit employees playing the piece "Dona Nobis Pacem" by composer Vaughan Williams and/or the piece

[43] Respondent also asserted that the AFM engaged in bad faith bargaining in 2015 (see R. Posttrial Br. at 78–81 (asserting, among other things, that the AFM made regressive proposals during the June 2015 bargaining sessions)), but of course, any such misconduct would have occurred after Respondent unilaterally implemented its contract proposal on October 20, 2014.

[44] Respondent asserts that the concerns that the AFM expressed about needing responses to its July 2014 information request were essentially a sham to avoid discussing the merits of Respondent's contract proposal. (See R. Posttrial Br. at 87.) I disagree. The AFM was well within its rights to request information that would enable it to understand and evaluate Respondent's contract proposal, and the AFM was also well within its rights to refrain from making a counterproposal until it received the information from Respondent that it needed.

[45] To the extent that Respondent relies on remarks that AFM Executive Board Member Tino Gagliardi made to Vriesenga in February 2014 (see FOF, Section II(E)(1)), I note that there is no evidence that Gagliardi was actively involved in bargaining with the CSA, either directly at the bargaining table or indirectly as someone who influenced or set the AFM's bargaining strategy. The fact that Gagliardi may have been opposed to the CSA doing media projects outside of the framework established in the AFM's media agreements does not undermine the fact that the AFM's actual bargaining team was open to bargaining with the CSA concerning its media plans (particularly if the final deal meant more money for musicians in the bargaining unit).

"Missa Mirabilis" by composer Stephen Hough, without retaining the master recording and rights to the material, and without compensating musicians under the terms of the SRLA;

(GC Exh. 1(oo) (pars. 9–10).)

2. Applicable legal standards

As previously noted, under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. Notably, an employer's regular and longstanding practices that are neither random, nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Mike-Sell's Potato Chip Co.*, 360 NLRB at 138–139 (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

3. Analysis

The IMA sets terms and conditions of employment for musicians when a symphony aims to produce and release audio or audio-visual recordings based on live symphonic, opera or ballet performances (or rehearsals). For a media project to be covered by the IMA (as opposed to another AFM media agreement), the symphony must retain ownership of the master recordings and the copyright for the recordings in question, but may license a third party to distribute or broadcast the recordings for a defined period of time. If the IMA indeed applies to a particular project, the symphony compensates musicians with (a) an up-front payment based on a percentage (typically between one and eleven percent, depending on the type of media project) of the symphony's weekly pay scale or, in the case of a television broadcast, based on a charge per each minute/hour of the broadcast; (b) a contribution to the AFM employers pension fund; and (c) a share of the net revenue for the project, with musicians receiving 60 percent of the revenue for a symphonic project after the symphony recovers the direct costs that it invested in the project. If the IMA does not apply to a particular media project, then by the terms of the IMA, the symphony must compensate musicians according to the requirements of the applicable AFM agreement. (FOF, Section II(B)(3)–(4).)

As noted above, the General Counsel alleges that Respondent unilaterally decided not to comply with the requirements of the IMA and other applicable AFM agreements for the following media projects: "Oh Heck Yeah"; "Amos Lee, Live at Red Rocks with the Colorado Symphony"; "Gregory Alan Isakov with the Colorado Symphony"; and "Dona Nobis Pacem"/ "Missa Mirabilis." Before reaching the merits of those allegations, I must address Respondent's argument that the complaint allegations about these four media projects are time-barred under Section 10(b) of the Act because Respondent recorded the music for the projects more than six months before the AFM filed a corresponding unfair labor practices charge. (R. Posttrial Br. at 108–109.) The General Counsel maintains that the complaint allegations are not time barred because the AFM filed unfair labor practice charges within six months of receiving notice about the media projects (irrespective of when the media projects were recorded and whether the CSA musicians' orchestra committee or DMA representatives knew about the projects at an earlier date). (GC Posttrial Br. at 92–95.) The following table sets forth the dates that are relevant to the parties' arguments concerning Section 10(b):

Media Project Name	**Recording Date(s)**	**AFM Notice of Project**	**Unfair Labor Practice Charge Filed**
Oh Heck Yeah	February 5, 2014	August 2014	November 10, 2014[46]
Dona Nobis Pacem/Missa Mirabilis	March 26–30, 2014	In or after May 2015	July 1, 2015
Amos Lee, Live at Red Rocks with the Colorado Symphony	August 1, 2014	In or around June 2015	July 1, 2015
Gregory Alan Isakov with the Colorado Symphony	July 13–14, 2015	In or around June 2016	June 30, 2016

[46] Respondent asserts that the AFM did not file an unfair labor practices charge covering the Oh Heck Yeah project (see R. Posttrial Br. at 108–109), and it is unclear whether the General Counsel disputes that assertion directly or instead argues that the complaint allegation regarding the Oh Heck Yeah project is closely related to this November 10, 2014 charge (which, among other things, alleges that Respondent unilaterally changed musicians' terms and conditions of employment). In light of that ambiguity, I will evaluate whether the complaint allegation regarding the Oh Heck Yeah project is closely related to the allegations in a timely filed charge.

To decide whether complaint allegations are closely related to the allegations in a timely filed charge, the Board evaluates whether the complaint allegations are factually and legally related to the charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). In the November 10, 2014 charge for Case 27–CA–140724, the AFM alleged (among other things) that Respondent unilaterally changed the terms and conditions of employment. (GC Exh. 1(a).) The complaint allegations regarding the Oh Heck Yeah project are closely related to the allegations in the November 10, 2014 charge, because: (a) both the November 2014 charge and paragraph 9 of the complaint assert that Respondent unilaterally changed the terms and conditions of musicians' employment; and (b) the facts underlying the charge and the complaint allegation about the Oh Heck Yeah project arise out of the ongoing dispute between Respondent and the AFM about the parameters for Respondent to engage in and compensate musicians for media projects. I therefore find that the complaint allegations about the Oh Heck Yeah project are procedurally valid.

(FOF, Sec. II(T)(1)–(3), (5); GC Exhs. 1(a), (d), (hh).)

I agree with the General Counsel that the complaint allegations at issue here are not barred by Section 10(b). The Board has explained that the 10(b) period starts only when a party has clear and unequivocal notice that the Act has been violated, or alternatively when a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act (constructive notice). *Carrier Corp*, 319 NLRB 184, 190 (1995) (noting that the party raising the 10(b) affirmative defense has the burden of demonstrating notice); *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). Respondent argues that the AFM received constructive notice of the disputed media projects when the CSA musicians' orchestra committee approved the projects around the time when the projects were recorded. That argument falls short, however, because Respondent did not have a reasonable basis to believe that the orchestra committee had the authority to act as the AFM's agent for receiving notice of unilateral changes related to national media. Indeed, Respondent was aware that it needed to contact the AFM directly to address issues related to national media (at least in part because members of the CSA musicians negotiating committee told Respondent that whenever Respondent raised questions about national media), and for that reason Respondent sought to bargain with the AFM for a successor to the IMA. (FOF, Sec. II(A)(3), (C)–(D), (N)(1).) Accordingly, I find that the 10(b) period for filing an unfair labor practice charge concerning the disputed media projects did not begin to run until the AFM had notice of the projects on the dates set forth above. Applying that standard, the complaint allegations about the media projects are timely, since they are each supported by (or reasonably related to) a timely unfair labor practices charge that was filed within 6 months of the AFM receiving notice of the media project. See *Brimar Corp.*, 334 NLRB 1035, 1035 fn. 1 (2001) (finding that a union steward's knowledge of a unilateral change could not be imputed to the union because the steward had no role in matters relating to bargaining and the employer had no reason to believe otherwise); *Catalina Pacific Concrete Co.*, 330 NLRB 144, 144 (1999) (rejecting the employer's 10(b) defense in part because the employer did not have a reasonable basis to believe that a union steward had the authority to act as the union's agent with respect to receiving notice of proposed unilateral changes), enfd. 19 Fed. Appx. 683 (9th Cir. 2001).

Turning to the merits of the General Counsel's allegations, it is clear that Respondent unilaterally changed musicians' terms and conditions of employment for the "Amos Lee, Live at Red Rocks with the Colorado Symphony," "Gregory Alan Isakov with the Colorado Symphony," and "Dona Nobis Pacem"/"Missa Mirabilis" media projects. Indeed, Respondent does not assert that it complied with the IMA or another applicable AFM agreement when compensating musicians or setting other terms and conditions of employment for those three projects (see R. Posttrial Br. at 108 (contending that the Amos Lee and Gregory Isakov projects were lawful under the terms of the contract proposal that Respondent unilaterally implemented in October 2014)). Moreover, the record establishes that although Respondent did not retain ownership of the master recordings and the copyright for the recordings (a fact that precludes the media project from being covered by the IMA),[47] Respondent did not compensate musicians according to another appropriate AFM agreement such as the SRLA. (FOF, Sec. II(T)(2)–(3), (5).) Since Respondent did not notify the AFM of these changes to musicians' terms and conditions of employment for the "Amos Lee, Live at Red Rocks with the Colorado Symphony," "Gregory Alan Isakov with the Colorado Symphony," and "Dona Nobis Pacem"/"Missa Mirabilis" media projects or give the AFM an opportunity to bargain about the changes and their effects, I find that Respondent violated Section 8(a)(5) and (1) of the Act.[48]

The Oh Heck Yeah project poses a closer question because the evidentiary record shows that Respondent recorded the music for the project during a live performance, retained ownership of the master recordings and copyright for the recordings, and compensated musicians according to the terms of the IMA. (FOF, Sec. II(T)(1).) Notwithstanding those facts, the key question is whether the music for the Oh Heck Yeah project was used for a video game soundtrack (in which case musicians should have been compensated in accordance with the AFM's video game agreement), or instead was used in a manner consistent with (and permitted by) the IMA. While I understand Respondent's point that the Oh Heck Yeah project had a public arts purpose, I find that the project falls within the scope of the AFM's video game agreement, which covers the production or recording of original music for use in "animated/interactive/video game or educational software." Consistent with my finding, Respondent, in one of its position statements, described the Oh Heck Yeah project as a large-scale video game. (FOF, Sec. II(T)(1).) Since the Oh Heck Yeah project was a video game (irrespective of whether the project had an artistic or educational purpose), Respondent was obligated to compensate its musicians under the AFM's video game agreement or bargain with the AFM for different terms and condi-

[47] The contracts that Respondent signed for the Amos Lee and Gregory Isakov projects explicitly state that Respondent agreed to sell its rights to the master recordings and copyrights to the recordings for the projects. (See FOF, Sec. II(T)(3), (5).) For the Dona Nobis Pacem/Missa Mirabilis project, Respondent and Hyperion records contemplated a similar arrangement, but never executed a contract. I nevertheless find that Respondent sold its rights to Hyperion Records as contemplated, because both Respondent and Hyperion Records proceeded to complete the project and exercise their rights in accordance with the unexecuted contract (e.g., by Respondent requesting and receiving an allotment of CDs from Hyperion as contemplated in the contract, and by Hyperion identifying itself on the CD liner notes as the holder of the copyrights to the recordings on the CD). (See FOF, Sec. II(T)(2).)

[48] As the General Counsel points out (see GC Posttrial Br. at 91), even if Respondent had lawfully implemented its June 2014 contract proposal (e.g., due to a valid impasse in October 2014), Respondent still made unlawful unilateral changes for these three media projects because the June 2014 contract proposal required Respondent to retain ownership of the master recordings and copyrights for the recordings, and Respondent did not retain such ownership or notify and bargain with the AFM about those changes and their effects. (See FOF, Section II(F).)

tions of employment for the project.[49] Respondent did not do so for the Oh Heck Yeah project, and thus I find that Respondent ran afoul of Section 8(a)(5) and (1) of the Act.

F. Did Respondent Violate Section 8(a)(5) and (1) of the Act by negotiating changes to terms and conditions of employment directly with bargaining unit employees, and/or by implementing changes to terms and conditions of employment based on those negotiations?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by:

> (a) between October 2014 and June 2015, bypassing the AFM and engaging in direct dealing with unit employees over application of the terms of the contract proposal (including, but not limited to revenue sharing terms) that Respondent implemented on October 20, 2014;
>
> (b) in early September 2015, bypassing the AFM and dealing directly with members of the DMA's negotiating committee to bargain over musicians' terms and conditions of employment for audio-visual media production, including the bargaining unit's break times, scheduling, and service credits for recording sessions; and
>
> (c) on or about September 7, 2015, unilaterally changing bargaining unit employees' break times, service length, and per-service compensation and credit for recording session services, without first notifying the AFM and affording the AFM an opportunity to bargain about the changes and their effects.

(GC Exh. 1(oo) (pars. 11–12).)

2. Applicable legal standards

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. Notably, an employer's regular and longstanding practices that are neither random, nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Mike-Sell's Potato Chip Co.*, 360 NLRB at 138–139 (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

3. Analysis

In November 2014, Respondent began meeting with members of the CSA musicians' negotiating committee to bargain for a successor collective-bargaining agreement with the DMA.[50] On April 10, 2015, Respondent (through Copenhaver) suggested that the parties discuss pay for substitute musicians on media projects because those musicians would not be eligible to receive a bonus under Respondent's success sharing plan (from its implemented proposal) if Respondent finished the fiscal year with a surplus in its overall budget. Consistent with Copenhaver's suggestion, Respondent's representatives and the negotiating committee subsequently (from April to June 2015) bargained over: the approach to substitute and extra musicians for both regular work and media work; how the EMG would work under Respondent's implemented proposal (which, in contrast to the IMA, did not use the EMG concept); and a side letter for operations until the various AFM issues were resolved. The AFM was not included in any of these negotiations. (FOF, Sec. II(N)(2), (Q).)

On August 8, 2015, Respondent (again, through Copenhaver) contacted the negotiating committee to propose language for the local collective-bargaining agreement that would cover studio recording sessions. Specifically, Respondent suggested deleting the requirement in the contract that recording sessions comply with the terms of the appropriate AFM agreement, and also suggested that Respondent should be permitted (based on a conversion formula) to count recording sessions as one or more of the musician's weekly services (instead of treating the recording sessions as separate work altogether). In addition, Respondent proposed that musicians receive an average of 20 minutes of breaktime for each hour of a recording service, and that if the negotiating committee agreed, Respondent could implement the proposed terms "pending resolution of the AFM issues and a formal vote." All of those proposals were departures from the status quo under the applicable AFM agree-

[49] Given its public arts purpose, the Oh Heck Yeah project might have been a good candidate for a one-time agreement with the AFM to permit Respondent to do the project under different (and perhaps less costly) terms and conditions of employment than those set forth in the AFM's video game agreement. Unfortunately, Respondent never attempted to negotiate such an agreement with the AFM for the Oh Heck Yeah project.

[50] The General Counsel asserts that Respondent also engaged in direct dealing in October 2014 by meeting with musicians in October 2014, to seek their approval before implementing its proposal on October 20, 2014. (GC Posttrial Br. at 97–98.) The evidentiary record does not support that theory. Instead, the evidentiary record shows that Respondent met with musicians after it implemented its proposal to notify them about the implementation. To the extent that musicians voted in an informal straw poll to support Respondent's decision to implement its proposal, the musicians did that on their own after Respondent's representatives left the meeting. (FOF, Sec. II(K)(1); see also *Johnson's Industrial Caterers, Inc.*, 197 NLRB 352, 356 (1972) (explaining that telling employees about an implemented unilateral change that will affect them does not constitute direct dealing), enfd. 478 F.2d 1208 (6th Cir. 1973).

ments, yet the AFM was not involved in any of the negotiations. (FOF, Sec. II(R)(1)–(2).)

On September 7, 2015, the negotiating committee contacted all CSA musicians to advise that it had agreed with Respondent to implement the terms that Copenhaver set forth in his August 8 email. Accordingly, Respondent followed those new terms/rules for recording sessions when CSA musicians recorded (on September 8–10, 2015) a soundtrack for the film "The Rendezvous," and when CSA musicians recorded (on October 27–28, 2015) a soundtrack for the video game "Banner Saga 2." (FOF, Sec. II(R)(3)–(4), (T)(6)–(7); see also FOF, Section II(T)(7) (noting that, for the Banner Saga 2 project, Respondent and the negotiating committee agreed to follow the recording session breaktimes set forth in the AFM's video game agreement).)[51]

Respondent generally does not dispute any of the facts underlying the complaint allegations discussed in this section. Instead, Respondent argues that it was permitted to bargain and reach agreements with the negotiating committee because the negotiating committee had actual or apparent authority to engage in such bargaining under the local collective-bargaining agreement. (R. Posttrial Br. at 112–118.) Respondent's argument misses the mark, however, because Respondent, having signed the 2009–2013 IMA, had a duty to bargain with the AFM about national media issues, and also had a duty to maintain the status quo for musicians' terms and conditions of employment on national media projects, particularly as to terms and conditions that were not addressed in Respondent's (unlawfully) implemented contract proposal. *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 4 (2016) (explaining that an employer has a duty to maintain the status quo for mandatory subjects of bargaining, which in the post-contract expiration context consists of the terms and conditions of employment existing on the expiration date of the parties' collective-bargaining agreement). Thus, to the extent that Respondent wished to make changes to the status quo (such as changes to the terms and conditions for recording sessions as set forth in the IMA and the AFM's other media agreements), Respondent was obligated to bargain with the AFM about those changes.

Moreover, the evidentiary record does not support Respondent's argument that the CSA musicians' negotiating committee had actual or apparent authority to bargain about national media projects. First, Respondent admitted in one of its position statements that it has a bargaining relationship the DMA for live performances and other local issues, and also has a bargaining relationship with the AFM for national issues like electronic media. Second, both the IMA and the local collective-bargaining agreement require Respondent to comply with the terms and conditions of employment that are set forth in the IMA or other applicable AFM agreement when doing media projects. And third, both the DMA and the negotiating committee consistently (at least up to October 20, 2014) advised Respondent that it needed to negotiate with the AFM about any national media issues. (FOF, Sec. II(A)(3), (C)(3), (N)(1); see also GC Exh. 53 (Articles 4.9(C), 6.3(E)–(D), 6.6(B)(4), 14.1, 14.3) (Respondent's 2013–2015 collective-bargaining agreement with the DMA, which indicates that the applicable AFM recording agreement governs, among other things: EMG and how it is used; recording session scheduling; recording session breaks; and generally all audio and video recording work).) Thus, Respondent was well aware that the AFM, and not the CSA musicians' negotiating committee, was the entity that Respondent needed to negotiate with about any changes to the terms and conditions of employment for national media recording sessions. See *Musical Arts Assn.*, 356 NLRB at 1483 (finding that a symphony violated Section 8(a)(5) and (1) of the Act by refusing to negotiate with the AFM about media issues, and noting that all parties, including the local union and the symphony, "were keenly aware that there had been a division of representation" between the AFM and the local union relating to national and local media issues).

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing with CSA musicians between April and June 2015, and also between August and September 2015. In each of those time periods, Respondent communicated directly with musicians on the CSA musicians' negotiating committee for the purpose of changing the terms and conditions of employment that apply when musicians work on media projects (as summarized above and set forth in the finding of fact), and excluded the AFM from those communications even though the AFM represents the musicians on national media issues. I also find that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about September 7, 2015, unilaterally changing bargaining unit employees' breaktimes, service length, and per-service compensation and credit for recording session services, without first notifying the AFM and affording the AFM an opportunity to bargain about those changes and their effects.

G. Did Respondent Violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from the AFM as the joint exclusive collective-bargaining representative of the bargaining unit?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about June 17, 2016, withdrawing recognition of the AFM as the joint exclusive collective-bargaining representative of the bargaining unit. (GC Exh. 1(oo) (par. 13).)

2. Applicable legal standards

An employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001); see also *Veritas Health Services, Inc.*, 363 NLRB No. 108, slip op. at 9 (2016) (noting that the employer must have the evidence that the union has lost majority support at the time that the employer withdrew recognition).

[51] To the extent that the evidentiary record shows that Respondent made additional unilateral changes to musicians' terms and conditions of employment on or about October 12, 2015 (see FOF, Section II(R)(5)), I do not address those here because the General Counsel has not alleged those as separate violations in the complaint. (See GC Exh. 1(oo) (par. 11) (referring only to unilateral changes made on or about September 7, 2015); GC Posttrial Br. at 102–105 (same).)

3. Analysis

As indicated in the findings of fact, when the AFM submitted an information request in June 2016, Respondent, on June 17, 2016, refused to provide the information because "the [AFM] is not the certified bargaining representative of the musicians at the [CSA]" and absent evidence of such recognition in accordance with the law, the "AFM has no arguable entitlement to request the information described in your correspondence." Respondent reiterated its position on June 23, 2016, when it asserted that the documents that the AFM provided did not prove that the AFM is the lawful exclusive representative of Respondent's musicians, and added that the musicians "clearly have not chosen AFM as their exclusive representative." (FOF, Section II(S).)

In its defense, Respondent asserts that it did not withdraw recognition from the AFM in its June 2016 communications, but instead merely asserted its legal position that the AFM needed to prove that it lawfully represented Respondent's musicians. (R. Posttrial Br. at 118–120.) I do not find Respondent's argument to be persuasive. Through its June 2016 communications to the AFM, Respondent disregarded years of recognizing the AFM as the bargaining unit's representative for national media issues and bluntly asserted that the AFM had no legal status as the bargaining unit's representative. Accordingly, I find that Respondent did withdraw recognition from the AFM on or about June 17, 2016, and I also find that by withdrawing recognition from the AFM when it (Respondent) did not have evidence that the AFM had in fact lost the support of a majority of the employees in the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By, since about July 21, 2014, failing and refusing to provide information in response to the AFM's July 18, 2014 information request (specifically, requests 1–2, 3(b)–(c), 5–6), Respondent violated Section 8(a)(5) and (1) of the Act.

2. By, since about June 4, 2015, failing and refusing to provide information in response to the AFM's June 4, 2015 and June 17, 2015 information requests, Respondent violated Section 8(a)(5) and (1) of the Act.

3. By, since about June 24, 2015, failing and refusing to provide information in response to the AFM's June 3, 2015 information request, Respondent violated Section 8(a)(5) and (1) of the Act

4. By, since about June 17, 2016, failing and refusing to provide information in response to the AFM's June 16, 2016 information request, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By, on or about October 20, 2014, unilaterally implementing its opening, June 23, 2014, contract proposal without first bargaining with the AFM to an overall good-faith impasse for a successor collective-bargaining agreement to the IMA, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By, on or about February 5, 2014, unilaterally and without first notifying the AFM and affording the AFM an opportunity to bargain about the media project and its effects, recording a soundtrack for a video game called "Oh Heck Yeah" without retaining the master recording and rights to the material, and with compensation to musicians paid under the terms of the IMA instead of the AFM's video game agreement, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By, on or about March 26–30, 2014, unilaterally and without first notifying the AFM and affording the AFM an opportunity to bargain about the media project and its effects, recording bargaining unit employees playing the piece "Dona Nobis Pacem" by composer Vaughan Williams and the piece "Missa Mirabilis" by composer Stephen Hough, without retaining the master recordings and rights to the material, and without compensating musicians under the terms of the SRLA, Respondent violated Section 8(a)(5) and (1) of the Act.

8. By, on or about June 16, 2015, unilaterally and without first notifying the AFM and affording the AFM an opportunity to bargain about the media project and its effects, releasing a CD titled "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra" through a third party commercial production company, without retaining the master recording and rights to the material (recorded on or about August 1, 2014), and with compensation to musicians paid under the terms of the IMA instead of the SRLA, Respondent violated Section 8(a)(5) and (1) of the Act..

9. By, on or about July 13–14, 2015, unilaterally and without first notifying the AFM and affording the AFM an opportunity to bargain about the media project and its effects, recording bargaining unit employees playing in accompaniment to the folk recording artist Gregory Alan Isakov for a CD titled "Gregory Alan Isakov with the Colorado Symphony," without retaining the master recording and rights to the material, and without compensating musicians under the terms of the SRLA, Respondent violated Section 8(a)(5) and (1) of the Act.

10. By, from about April to June 2015, bypassing the AFM and dealing directly with CSA musicians to bargain over application of the terms of the contract proposal (including, but not limited to, how EMG could be used and how substitute and extra musicians would be compensated for work on media projects) that Respondent implemented on October 20, 2014, Respondent violated Section 8(a)(5) and (1) of the Act.

11. By, in or about August and September 2015, bypassing the AFM and dealing directly with CSA musicians to bargain over musicians' terms and conditions of employment for audiovisual media production, including the bargaining unit's break times, scheduling, and service credits for recording sessions, Respondent violated Section 8(a)(5) and (1) of the Act.

12. By, on or about September 7, 2015, unilaterally changing bargaining unit employees' break times, service length, and per-service compensation and credit for recording session services, without first notifying the AFM and affording the AFM an opportunity to bargain about the changes and their effects, Respondent violated Section 8(a)(5) and (1) of the Act.

13. By, on or about June 17, 2016, withdrawing recognition from the AFM as the joint exclusive collective-bargaining representative of the bargaining unit, Respondent violated Section 8(a)(5) and (1) of the Act.

14. By committing the unfair labor practices stated in conclusions of law 1–13 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall immediately put into effect all terms and conditions of employment provided by the IMA that expired on September 30, 2013, and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the AFM has agreed to changes. In addition, Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unlawful unilateral decisions to: implement its June 23, 2014 contract proposal (on or about October 20, 2014); record a soundtrack for the "Oh Heck Yeah" project (on or about February 5, 2014); record the piece "Dona Nobis Pacem" by composer Vaughan Williams and the piece "Missa Mirabilis" by composer Stephen Hough (on or about March 26–30, 2014); release a CD titled "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra" through a third party commercial production company (on or about June 16, 2015); record bargaining unit employees playing in accompaniment to the folk recording artist Gregory Alan Isakov for a CD titled "Gregory Alan Isakov with the Colorado Symphony" (on or about July 13–14, 2015); and change bargaining unit employees' break times, service length, and per-service compensation and credit for recording session services (on or about September 7, 2015). Backpay for these violations shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). I further recommend that the Respondent be ordered to make all contributions to any funds established by the collective-bargaining agreements with the AFM which were in existence on February 5, 2014, and which contributions Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 (1979).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 27 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In addition to the traditional remedies set forth above, the General Counsel asks that I also order the extraordinary remedy of requiring Respondent to (upon the AFM's request) comply with the following bargaining schedule: bargain no less than 24 hours per month until agreement or lawful impasse is reached, under supervision of the Regional Director (with supervision facilitated by a requirement that Respondent file written bargaining progress reports every 15 days to the compliance officer of Region 27). (GC Posttrial Br. at 108–109, 111.)

It is well established that the Board, in appropriate circumstances, "is capable of providing other than the usual remedial relief in order to rectify particular unfair labor practices." *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978). Thus, the Board can, as an extraordinary remedy, impose a bargaining schedule, but the case law is still developing about when a bargaining schedule is appropriate because it appears that the Board first imposed a bargaining schedule as a remedy in 2011. Compare *Gimrock Construction*, 356 NLRB 529, 529 (2011), enforcement denied in part on other grounds, 695 F.3d 1188 (11th Cir. 2012) with *McCarthy Construction Co.*, 355 NLRB 365, 365 fn. 3 (2010).

Based on the available case law, the Board requires, as a predicate for imposing a bargaining schedule, some evidence of egregious misconduct associated with the respondent's failure to bargain. For example, in *Professional Transportation, Inc.*, the Board agreed to impose a bargaining schedule because the respondent "engaged in a series of dilatory tactics in contravention of its duty to bargain in good faith," including canceling seven consecutive bargaining sessions and insisting, to the point of impasse, that if the Supreme Court affirmed the U.S. Court of Appeals for the D.C. Circuit in *Noel Canning*, then any collective-bargaining agreement that the parties reached would be nullified, and the respondent would no longer recognize the union. 362 NLRB No. 60, slip op. at 3 (2015); see also *Thermico Inc.*, 364 NLRB No. 135, slip op. at 3 fn. 4 (2016) (bargaining schedule imposed because 11 months passed since the union's first bargaining request, the respondent refused or did not respond to the union's bargaining requests, and the respondent abrogated its obligation to bargain pursuant to a bilateral settlement); *Camelot Terrace*, 357 NLRB 1934, 2005 (2011) (bargaining schedule imposed because, inter alia, the respondent engaged in persistent and flagrant unfair labor practices, and also failed to comply with the bargaining schedules in two settlement agreements), enforcement denied in part on other grounds, 824 F.3d 1085 (D.C. Cir. 2016); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2, 733 (2011) (bargaining schedule imposed due to egregious misconduct that included the respondent soliciting and encouraging petitions to decertify the union, withdrawing recognition from the union based on one of the petitions that the respondent solicited, and failing to provide information that the union requested), enfd. 540 Fed. Appx. 484 (6th Cir. 2013); *Gimrock Construction*, 356 NLRB at 529 (bargaining schedule imposed due to the respondent's continuing refusal, over a period of years, to comply with the Board's bargaining order).

As set forth above, I have found that Respondent violated Section 8(a)(5) of the Act in multiple ways, including but not limited to failing and refusing to provide information to the AFM, unilaterally implementing its first and only contract proposal in the absence of a valid impasse, and unilaterally changing the terms and conditions of employment for musicians' work on media projects. While those violations are certainly serious, I do not think that the violations are on par with the violations or misconduct (such as disregarding a previous bargaining order or settlement agreement) that led the Board to

impose bargaining schedules in the cases discussed above. In addition, I would be remiss if I did not recognize that the AFM was largely responsible for a 9-month delay (from October 2013 through June 2014) in the parties getting to the bargaining table after the IMA expired (an issue that the AFM resolved via settlement). Given those circumstances, I do not deem it appropriate to impose a bargaining schedule in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

Respondent, Colorado Symphony Association, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the AFM by failing and refusing to furnish the AFM with requested information that is relevant and necessary to the AFM's performance of its functions as the collective-bargaining representative of Respondent's employees regarding wages, hours and other terms and conditions of employment for the production of national electronic and recorded media.

(b) Unilaterally implementing its contract proposals without first bargaining with the AFM to an overall good-faith impasse for a successor collective-bargaining agreement to the IMA.

(c) Unilaterally changing bargaining unit musicians' terms and conditions of employment for work on national media projects without first notifying the AFM and affording the AFM an opportunity to bargain about the changes and their effects.

(d) Failing to comply with the terms and conditions of employment that are set forth in the IMA that expired on September 30, 2013, until the parties agree to a new contract or good-faith bargaining leads to a lawful impasse.

(e) Bypassing the AFM and dealing directly with CSA musicians to bargain about wages, hours and other terms and conditions of employment for the production of national electronic and recorded media

(f) Withdrawing recognition from the AFM as the joint exclusive collective-bargaining representative of the bargaining unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize, and on request, bargain with the AFM as the exclusive collective-bargaining representative of the bargaining unit regarding wages, hours and other terms and conditions of employment for the production of national electronic and recorded media, and if an understanding is reached, embody that understanding in a signed agreement.

(b) Furnish to the AFM in a timely manner the information that the AFM requested on: July 18, 2014 (requests 1–2, 3(b)–(c), 5–6); June 3, 4, and 17, 2015; and June 16, 2016.

(c) Make whole, with interest and as provided for in the remedy section of this decision, Respondent's employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral decisions to: implement its June 23, 2014 contract proposal; have musicians work on the "Oh Heck Yeah," "Dona Nobis Pacem/Missa Mirabilis," "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra," and "Gregory Alan Isakov with the Colorado Symphony" media projects without paying proper compensation to musicians under the applicable AFM media agreement; and change employees' break times, service length, and per-service compensation and credit for national media recording session services.

(d) Make contributions, including any amounts due, to any fund identified in the IMA or applicable AFM agreement, which Respondent would have paid but for making unlawful unilateral changes to bargaining unit employees' terms and conditions of employment, as provided for in the remedy section of this decision.

(e) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility Denver, Colorado, copies of the attached notice marked "Appendix A."[53] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by Respondent at any time since February 5, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. February 14, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the AFM by failing and refusing to furnish the AFM with requested information that is relevant and necessary to the AFM's performance of its functions as the collective-bargaining representative of our bargaining unit employees regarding wages, hours and other terms and conditions of employment for the production of national electronic and recorded media.

WE WILL NOT unilaterally implement our contract proposals without first bargaining with the AFM to an overall good-faith impasse for a successor collective-bargaining agreement to the IMA.

WE WILL NOT unilaterally change bargaining unit musicians' terms and conditions of employment for work on national media projects without first notifying the AFM and affording the AFM an opportunity to bargain about the changes and their effects.

WE WILL NOT fail to comply with the terms and conditions of employment that are set forth in the IMA that expired on September 30, 2013, until the parties agree to a new contract or good-faith bargaining leads to a lawful impasse.

WE WILL NOT bypass the AFM and deal directly with CSA musicians to bargain about wages, hours and other terms and conditions of employment for the production of national electronic and recorded media.

WE WILL NOT withdraw recognition from the AFM as the joint exclusive collective-bargaining representative of the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and on request, bargain with the AFM as the exclusive collective-bargaining representative of the bargaining unit regarding wages, hours and other terms and conditions of employment for the production of national electronic and recorded media, and if an understanding is reached, embody that understanding in a signed agreement.

WE WILL furnish to the AFM in a timely manner the information that the AFM requested on: July 18, 2014 (requests 1–2, 3(b)–(c), 5–6); June 3, 4, and 17, 2015; and June 16, 2016.

WE WILL make whole, with interest, our employees and former employees for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral decisions to: implement our June 23, 2014 contract proposal; have musicians work on the "Oh Heck Yeah," "Dona Nobis Pacem/Missa Mirabilis," "Amos Lee, Live at Red Rocks with the Colorado Symphony Orchestra," and "Gregory Alan Isakov with the Colorado Symphony" media projects without paying proper compensation to musicians under the applicable AFM media agreement; and change employees' breaktimes, service length, and per-service compensation and credit for national media recording session services.

WE WILL make contributions, including any amounts due, to any fund identified in the IMA or applicable AFM agreement, which we would have paid but for making unlawful unilateral changes to bargaining unit employees' terms and conditions of employment.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

COLORADO SYMPHONY ASSOCIATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-140724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B
Corrections to Transcript
Colorado Symphony Association, 27–CA–140724, et al.

Transcript Page:Line	**Transcript Correction**
Throughout the transcript	"Kaiser" and "Kiser" should be "Keyser" (unless the reference is to the law firm of "Bredhoff & Kaiser")
Throughout the transcript	"Briesenga," "Riezenga" and "Rhizanga" should be "Vriesenga"
10:22	"dong" should be "don't"
12:15	"policy" should be "a possibility"
23:9	"85" should be "8(a)(5)"
55:3	"Integrative" should be "Integrated"
55:4–5	"0913" should be "09–13" and "1517" should be "15–17"
61:14	"their" should be "they're"
61:15	"buy" should be "by"
63:8	"MSD" should be "EMSD"
82:16	"ICSOM" should be "OCSM"
83:19	"ICSOM" should be "OCSM"
117:15	"gratification" should be "ratification"
132:11	"money" should be "running"
137:6	"Waiver" should be "Labor"
145:16	"integrated Meeting" should be "Integrated Media"
146:7 and 146:10	"permanent" should be "per-minute"
152:19	"raise" should be "rates"
153:10	"can't" should be "can"
163:3	"ran" should be "grant"
164:5	"I" should be "not"
170:14	Attorney Scully was the speaker
170:23	Attorney Scully was the speaker
191:7	"rage" should be "wage"
192:15	"Exxon" should be "ICSOM" and "Oxen" should be "OCSM"
195:20	"INA" should be "IMA"
196:1	The speaker was unknown
200:5	"snap" should be "snatch"
223:2	"Maseland" should be "Naslund"
240:18	"Aimlessly" should be "Amos Lee"
240:21	"Aimlessly" should be "Amos Lee"
244:8	"of a fact" should be "of the effect"
247:8	"rehearsed something" should be "a hearsay objection"
248:6	"Harris" should be "Hair"
260:25	"unit" should be "notes"
266:24	"our" should be "R"
270:13	Attorney Devitt was the speaker
301:15	"bay" should be "buffet"
306:23	"parties" should be "projects"
379:9	Attorney Freund was the speaker
379:11	ALJ Carter was the speaker
423:7	"Laskey" should be "Lasky"
424:15	The court reporter was the speaker
431:12	"property" should be "properly"
474:21	"theoretical" should be "theatrical"
495:2	Attorney Scully was the speaker
496:22	ALJ Carter was the speaker
528:1	"directed at – can" should be "direct examination"
621:2–3	"CVA" should be "CBA"

Transcript Page:Line	Transcript Correction
627:24	"pack" should be "patch"
642:11	"imitated" should be "initiated"
655:8	"ULB" should be "ULP"
847:5 and 847:8	The court reporter was the speaker
854:2	"Clare" should be "player"
868:21	"2623" should be "20–623"
869:8	"a sole" should be "also"
880:3	The court reporter was the speaker
892:8	"direct" should be "direct dealing"
896:22	"free" should be "three"
900:21	"voted" should be "devoted"
910:25	"coral" should be "choral"
911:3	"pat" should be "patch"
963:23	"2623" should be "20–623"
972:24	"collectible" should be "collective"
985:19	"CVA" should be "CBA"
1056:23	"Miss Mirabella's" should be "Missa Mirabilis"
1115:14	"collectible" should be "collective"
1123:11	"lab or" should be "labor"
1157:25	"affidavit" should be "AFM"
1245:13	The court reporter was the speaker
1247:3	"principal" should be "principle"
1253:20	"DNA" should be "DMA"
1268:1 and 1268:3	The court reporter was the speaker
1303:25	"that's – of" should be "that's to the detriment of"
1313:19	"in the turn of the eye" should be "and can return to the gallery"
1318:7	"Bartles" should be "Bartels"
1338:11	"knew" should be "new"
1344:11	"there have" should be "there may have"
1352:2	"Jonra" should be "genre"
1367:8	"We have" should be "We don't have"
1370:6	"myself on" should be "my cell phone"
1377:18	"Biffs" should be "BIS"
1408:1	"Grand Prix" should be "Gregory"
1444:3	"marry into" should be "Mary and to"
1454:2	"he say" should be "CSA"
1496:14	"collectible" should be "collective"
1507:24	"invitation" should be "implementation"
1517:3 and 1517:10–11	"principle" should be "principal"
1550:23	"it" should be "in"
1557:8	"Keyser" should be "Kaiser"
1566:7	"SROA" should be "SRLA,"
1566:13 and 1566:15	"SROA" should be "SRLA"
1576:6	"Geoff" should be "Jeff"
1581:8	"hole" should be "whole"
1581:23–25	"pig and a poke" should be "pig in a poke"
1588:9–10	"Keyser" should be "Kaiser"
1609:10	"failing" should be "prevailing"

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COLORADO SYMPHONY ASSOCIAITION AND FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO/CLC	**Cases** 27-CA-140724 27-CA-155238 27-CA-161339 27-CA-179032 DATE OF SERVICE July 3, 2018

AFFIDAVIT OF SERVICE OF BOARD DECISION

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

E-SERVICE
Patrick R. Scully, Esq.
Sherman & Howard, LLC
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Denver, CO 80202-3622

CERTIFIED & REGULAR MAIL
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E-SERVICE
Region 27, Denver, Colorado
NATIONAL LABOR RELATIONS BOARD
600 17TH ST 7TH FL NORTH TOWER
DENVER, CO 80202-5433

Subscribed and sworn before me this 3rd day of July 2018.	DESIGNATED AGENT A Jones NATIONAL LABOR RELATIONS BOARD